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IN THE

Supreme Court of the United States

October Term, 19[illegible]

Number 627

HANNAHVILLE INDIAN COMMUNITY, ET. AL.,
Petitioners.

VS.

THE PRAIRIE BAND OF POTAWATOMI INDIANS ET. AL.;
THE CITIZEN BAND OF POTAWATOMI INDIANS ET. AL.;

and

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, WITH APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1958

No. 2-57

THE PRAIRIE BAND OF POTAWATOMI INDIANS, ET AL.,
Appellees,

v.

UNITED STATES OF AMERICA,
(Defendant) and Appellee.

THE CITIZEN BAND OF POTAWATOMI INDIANS, ET AL.,
Appellees,

v.

UNITED STATES OF AMERICA,
(Defendant) and Appellee.

HANNAHVILLE INDIAN COMMUNITY, ET AL.,
(Intervenors) and Appellants.

Petition for a Writ of Certiorari to the United States Court of Claims

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The Petitioners (Hannahville Indian Community, Forest County Potawatomi Community and Elijah Petonquot and Frank Wandahsego Sr., members of the Hannahville Indian Community; Valentine Ritchie and Isaac George, members of the Forest County Potawatomi Community, and Michael Williams and Albert Mackety, members of

the Potawatomi Indians of Michigan and Indiana), pray that a Writ of Certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause on July 16, 1958. Motion for rehearing was overruled October 8, 1958.

The Indian Claims Commission on September 30, 1956 awarded the two appellee Potawatomi Indian groups of Oklahoma and Kansas $3,290,217 (less previous treaty payment of $850,000) as additional consideration for two areas of tribal land in Iowa and Kansas, ceded in June, 1846, (9 Stat. 853) because the treaty consideration of $850,000 was unconscionable. On the same day, the Commission dismissed the intervening petition of Petitioners here who claim "their proportionate share" of the increase in the consideration as a recognized part of the Potawatomi group that owned the land when it was ceded and from which the tribal funds sought were derived. The Defendant (United States) agreed with the position of Petitioners before the Commission and the Court of Claims.

Petitioners complain that the Commission erred and the Court of Claims erred in sustaining the Commission because the Congress of the United States, in the exercise of its plenary power over Indians and their property, by Acts of 1864, 1906 and 1913 (infra, appx. 48A & 49A), recognized the right and interest of Petitioners and their ancestors as part of the Potawatomi group or tribe, to "their proportionate share" of tribal funds derived from the cession of the Iowa and Kansas land and paid it to Petitioners and their ancestors pursuant to the Act of 1913.

Petitioners assert that the Court of Claims and the Commission erred grievously in refusing to follow the actions of Congress with respect to the same tribal right and interest, the same treaty, and the same tribal people. If, as Congress decided, Petitioners were entitled to that

part of the consideration ($850,000) of 1846, they are now entitled to their share of the increase of that same consideration. If the Government had paid the now determined full value ($3,290,217) of the tribal land in 1846, Congress would have, in 1913, by the above acts paid to Petitioners and their ancestors their full share of the tribal funds and they would not now be here for relief.

OPINION BELOW

The Opinion of the Indian Claims Commission is reported in 4 Indian Claims Commission 515. The opinion of the Court of Claims is reported in 165 Fed. Sup. 139. (copies in Appendix.)

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958. A motion for rehearing was filed herein on August 11, 1958. The motion for rehearing was overruled on October 8, 1958. The jurisdiction of this Court is based upon 28 U.S.C. 1255, and section 20(b) and (c) of the Act of August 13, 1946, 60 Stat. 1049, known as the Indian Claims Commission Act.

PARTIES

The Petitioners are recognized groups of Potawatomi Indians in northern Wisconsin and upper Michigan and two individual members of each community and two individuals, Michael Williams and Albert Mackety, members of the recognized group of Potawatomi Indians, now incorporated, called the Potawatomi Indians of Michigan and Indiana. All were Appellants in the Court of Claims and Intervenors before the Indian Claims Commission. All joined in a class action for themselves and all other Potawatomi Indians similarly situated. Their right to proceed as they did is not questioned. Some of the

Potawatomis of Wisconsin recognized in 1913 are still living and are some of the Petitioners here.

The Prairie Band of Potawatomi Indians is a recognized group of Potawatomi Indians residing in the state of Kansas. They are hereinafter called the "Prairie Band."

The Citizen Band of Potawatomi Indians is a recognized group of Potawatomi Indians in the state of Oklahoma. They are hereinafter called the "Citizen Band."

The United States was Appellee and the Defendant below.

Before the Commission, a case (Docket 15J) was filed for the Prairie Band and a case (Docket 71A) was filed for the Citizen Band. The two cases were consolidated for trial at which time the Petitioners here filed their petition to intervene, claiming their proportionate share in any award made to the Plaintiffs in the two Dockets, 71A and 15J.

The Prairie Band and the Citizen Band filed their motion before the Indian Claims Commission to dismiss the intervening petition. The motion to dismiss was tried separately, separate findings of fact were proposed by all parties and separate findings of fact were made by the Commission and an opinion (Appx. 25A) was written by the Commission. The United States proposed findings of fact and filed a brief opposing the motion to dismiss the intervening petition. The Commission dismissed the intervening petition and granted an award, (under 60 Stat. 1049, supra) solely to the Prairie Band and the Citizen Band in the amount of $3,290,217; for a cession of Potawatomi land located in Iowa and Kansas that was ceded by a Treaty in 1846 (9 Stat. 853).

Petitioners here (Intervenors before the Commission) appealed to the United States Court of Claims. The

United States did not appeal but filed its brief in the Court of Claims again opposing motion to dismiss the intervening petition.

QUESTIONS PRESENTED

1. Can the Courts or the Indian Claims Commission, pursuant to the Indian Claims Commission Act (60 Stat. 1049) "inquire into" "question" or modify, by their own analysis, inferences or interpretations, the plain terms of Acts of Congress (1864, 1906, 1913 infra) by which the Congress, in the exercise of its plenary and constitutional power and right over Indian affairs, actually paid over to a recognized Indian group (Potawatomi) as part of the tribe, their (or its) proportionate share of the tribal funds, by arbitrarily concluding or stating that Congress "did not and did not intend to recognize" the interest of the group in the funds Congress paid over to the group?

The answer is that the Courts may not. The Acts of Congress established the intent and purpose of the Congress with relation to those Indians and their property beyond peradventure of doubt and the judiciary cannot, under a fiction of interpretation, question or inquire into the motives which prompted enactment of this legislation. (Lone Wolf v. Hitchcock 187 U. S. at 568 (1902)); also "we must presume that Congress acted in perfect good faith in dealing with the Indians" when it passed the above Acts by which the money was paid. It cannot be "denied that Congress possesses authority to determined the extent and manner" and to "legislate in reference to tribal property in any manner and to any extent it deems proper for the benefit of the tribe." (Cherokee Nation v. U. S. 92 Ct. Cls at 266).

2. Are the Acts of Congress (June 25, 1864, 13 Stat. 172; June 21, 1906, 34 Stat. 380; June 30, 1913, 38 Stat. 102 (Appx. 48, 49A) pursuant to which Congress determined

and paid to an identifiable group of Potawatomi Indians their proportionate share of the sale price ($850,000) of tribal lands as provided for in the Treaty of June 5-17, 1846, (9 Stat. 853), binding upon the Indian Claims Commission when it, pursuant to the Indian Claims Commission Act, in 1956, increased the sale price of $850,000 to $3,290,217 to provide additional compensation for the tribal land ceded in 1846, because the treaty sale price ($850,000) was unconscionable?

In other words, are the Acts of Congress (1864, 1906, and 1913, (*supra*) pursuant to which the United States recognized and paid to Petitioners and their ancestors as members of the Potawatomi tribe, their proportionate share of the sale or cession price of Indian tribal land ceded to the United States, as provided in the Treaty of 1846, binding upon the Indian Claim Commission and the Court so that the Commission must award to said recognized group (Petitioners) their proportionate share of any increase in the sale price the Commission may determine, under Section 2 of the Indian Claims Commission Act (*supra*), that should have been paid the tribe for land when it was ceded to the United States by the Treaty of 1846 (*supra*)?

It is the contention of Petitioners that:

> "Congress has plenary authority over tribal relations, a political question and one not controlled by the Courts. Any action of Congress in disposing of such lands is conclusive on the Courts. In such a disposal the judiciary cannot question or inquire into the motives which prompted the enactment of such legislation." (187 U. S. 553)

In other words, when Congress recognized Petitioners as part of the Potawatomi Indian group entitled to share in the proceeds of a cession of Potawatomi lands to the United States by the Treaty of 1846, said recognition by Congress entitles Petitioners to share in any additional

proceeds of the same lands recovered as a judgment in proceedings before the Indian Claims Commission under the Indian Claims Commission Act (*supra*).

3. Did the payments to Petitioners and their ancestors, pursuant to the Acts of Congress of 1864, 1906, 1913 (*supra*) by which they were paid "their proportionate share" of the sale price (treaty consideration) of the Potawatomi tribal lands ceded to the United States in the Treaty of 1846 (supra), constitute a recognition by Congress of their right to share in an award by the Indian Claims Commission in 1956, that is part of the consideration for the land when it was ceded in 1846?

Petitioners contend that Congress, in the Acts of 1864, 1906 and 1913 recognized the ancestors of Petitioners as a constituent part of the Potawatomi Tribe of Indians entitled to share with other Potawatomi Indians in the proceeds arising from the sale of lands to the United States in the Treaty of 1846. That recognition by Congress is binding on the Indian Claims Commission and the Court of Claims, and when a judgment is recovered by the Potawatomi Tribe before the Indian Claims Commission for additional payment for the lands ceded under said Treaty, the right of Petitioners as an Intervenor, to share in the distribution of said additional proceeds cannot be denied by said Court or the Commission and the Court of Claims erred in denying said right to Petitioners.

In other words, a recognition by Congress of the rights of Petitioners and their ancestors to share originally in the division of the proceeds of the sale of Potawatomi lands to the United States in the Treaty of 1846, is a recognition of Petitioners' right to share in the division of the award of the Indian Claims Commission increasing the consideration paid by the United States for the same lands ceded in said Treaty of 1846. A recognition of the rights of Petitioners by Congress in the proceeds

of the tribal lands is a recognition by Congress for all time thereafter of the same right.

4. Is a recognition by the political branch of our Government (Congress), acting within its plenary power over Indian affairs, of Petitioners' right as a recognized group of Potawatomi Indians entitled to participate in the tribal assets, binding thereafter upon the judicial branch of our Government?

Has the judicial branch the right to decide who are or are not a part of the Potawatomi Indian Tribe, when Congress, acting in its political capacity, and within its plenary power over Indian affairs, has clearly recognized Petitioners as an integral part of that tribe?

5. Has the Indian Claims Commission jurisdiction under the Indian Claims Commission Act to refuse Petitioners here the right to intervene and to participate in an award to the Potawatomi Indian Tribe, when Congress, acting in its political capacity, and within its plenary power over Indian affairs, has recognized Petitioners' interest and then paid them as an integral part of said Potawatomi Tribe?

6. Did the Court err in following as authorities *Eastern Band of Cherokees* v. *U. S. and Cherokee Nation*, 20 Ct. Cls. 499, and *United States* v. *Cherokee Nation*, 202 U. S. 101, (Op. p. 16, Appx. 16A) Those cases did not involve the plenary power of Congress. No acts of Congress were challenged.

We submit that this Court should grant a Writ of Certiorari in this case to decide those issues which are of great public importance and to right a wrong to several hundred Petitioners and to protect the rights of a great many more Indians who are similarly situated. Their rights, recognized by Congress, will be forever barred unless this Court now reviews the wrong done to these Indian wards of our Government.

STATUTES INVOLVED

See Appendix, pages 48A, 56A.

FACTS

The basic facts for Petitioners' intervening petition are in Senate Document No. 185, 57th. Congress, 2nd Session of February 27, 1903 (Appx. 56A) and House Document No. 830, 60th. Congress, 1st. Session (Appx. 70A), copied (except parts not deemed pertinent). Sen. Doc. 185 is Def. Exh. 40 and is part of Int. Exh. 79; House Doc. 830 is Def. Exh. 41 and Int. Exh. 85. We believe that a reading of those two exhibits will be convincing on the issue here.

The Potawatomis remaining in Wisconsin made demands upon the Government for their proportionate share of the tribal properties, which resulted in the Acts of Congress as discussed in Sen. Doc. 185 (Appx.) and Congress as discussed in Sen. Doc. 185 (Appx. 56A) and House Doc. 830 (Appx. 70A). By the Acts (1864, 1906, 1913, *supra*), Congress recognized Petitioners and their ancestors as part of the Potawatomi tribe and paid them their proportionate share of annuities, trust funds and other moneys of the tribe. In this proceeding, the Indian Claims Commission increased the treaty consideration from $850,000 to $3,290,217 because it determined that the $850,000 was an unconscionable price for tribal lands but it denied Petitioners a right to participate in the increased amount of the consideration.

If the United States had paid the price for the western land in 1846, as determined by the Indian Claims Commission in 1956, Petitioners would have been paid under the Acts of Congress the amount they are now suing for. In other words, they would have received their proportionate share of $3,290,217 instead of the proportionate share of $850,000.

SPECIFICATIONS OF ERROR

The Court of Claims erred in the following respects:

1. The Court of Claims and the Indian Claims Commission erred by failing or refusing to follow Acts of Congress (1864, 1906, 1913) by which Congress recognized and paid the amount due the Petitioners and their ancestors as their share of the tribal assets arising out of the sale of tribal lands ceded by the Treaty of 1846 (*supra*).

2. The Court of Claims and the Indian Claims Commission erroneously concluded they were not bound to follow the Acts of Congress (1864, 1906, 1913) in determining the rights of Petitioners to share in the additional consideration the Commission awarded in 1956 for tribal lands that were ceded in 1846, even though Congress, by the Acts of 1864, 1906 and 1913 (supra) recognized the rights of, and paid to, Petitioners and their ancestors, their proportionate share of the consideration that was paid by the Treaty for the same land in 1846.

3. The reasons stated by the Court for its answer to its first question (supra) in addition to being clear violations of the exclusive power of Congress in the premises as stated above, are all erroneous conclusions of the Court.

3A. The Court erred by holding (Op. p. 9, Appx. 10A) that "nothing was found" to show "these appropriations" were made because of any determination by "representatives" of the Government that the Potawatomi Indians of Wisconsin had "as a matter of tribal custom" or by the "exercise of federal power" over tribal funds, that Petitioners and their ancestors had an interest in such funds.

3B. The Court erred by disregarding the effect of the Act of Congress, June 30, 1913 (supra) and considered

only "The final appropriations" (Op. p. 8, Appx. 9A) that paid out the *remainder* of the money that was provided for Petitioners and their ancestors by the Act of 1913, supra, and by failing to realize and conclude that the words of each appropriation (Appx. 50-56A) were part of the Act of 1913 supra, and the determination of Congress to pay Petitioners their share of the funds of their tribe "as shown by House Document No. 830" set out in the Act of Congress.

3C. The Court of Claims erred by sustaining the Indian Claims Commission by stating that none of the appropriations were made a charge "against past, existing or future Potawatomi funds." (Op. p. 9, App. 10A).

3D. The Court of Claims erred in stating that it required a "more judicial" hearing of the claims of Petitioners at the time Congress recognized their rights. (Op. p. 10, Appx. 11A)

3E. The Court of Claims erred by holding the payment of "$447,339 to Potawatomi Indians of Wisconsin as their proportionate share of annuities, trust funds and other moneys of the tribe to which they belonged" was merely a gratuity in settlement of a "troublesome problem" (Op. pp. 9, 10, Appx. 11A), and not congressional recognition.

3F. The Court erred in concluding "Congress did not and did not intend to recognize" an interest of the Potawatomis of Wisconsin in the western lands of the Potawatomi tribe ceded by the Treaty of 1846 (supra) (Op. p. 10, Appx. 11A).

4. The Court erred in following cases, cited and relied upon, that were based upon Jurisdictional Acts of Congress and not upon the constitutional power of Congress itself, to deal with Indians and Indian property.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

A Writ of Certiorari should be granted here for the principal reason that the decisions of the Indian Claims Commission and the Court of Claims are in direct conflict with prior decisions of this Court holding that Congress has constitutional and plenary power over Indian affairs.

SPECIFICATIONS OF ERRORS 1 AND 2

The Court of Claims, in affirming the decision of the Indian Claims Commission (4 Ind. Cls. Com. 515), erroneously refused to follow the Acts of Congress 1864, 1906 and 1913, supra, and succeeding appropriation Acts (Appx. 48-56A). By those Acts, Congress had already determined the main issue here and the Court of Claims and the Indian Claims Commission should have followed those actions of Congress. The issue is one that falls within the plenary power of Congress to determine and once Congress acts thereon, courts are required to follow it. (*United States* v. *Holliday*, 70 U. S. L.C. 419 (1865); *Lone Wolf* v. *Hitchcock*, 187 U. S. L.C. 554 (1902)). The decision of the Indian Claims Commission, affirmed by the Court of Claims, by refusing to follow the Acts of Congress, overrules the decisions of this Court in those cases, and by devices, inferences and theories of the Commission limits the historic power of Congress over Indian tribes and their property.

The United States (Defendant and Appellee below) joined with Petitioners on this issue and opposed the motion to dismiss the intervening petition before the Indian Claims Commission (Gov. Br., opposing motion to dismiss, p. 44), and before the Court of Claims (Op. p. 9, Appx. 10A).

By the three Acts of Congress (1864, 1906, 1913, supra) and related appropriation Acts (Appx. 48-56A), Congress

recognized Petitioners and their ancestors as Potawatomi Indians and paid to them as descendants of the Potawatomi tribe owning the western land, *their proportionate share* of the cession price or treaty consideration paid for that tribal land ceded by the Treaty of June 5-17, 1846 (9 Stat. 853). The amount so paid under the Acts of Congress included the proportionate share of Petitioners and their ancestors in the $850,000 fixed by the 1846 Treaty as shown in Statement No. 2 of House Document No. 830 (Def. Exh. 41, Appx. 89A). That payment was a solemn determination by Congress of Petitioners' interest in the tribal property.

Since the opinion of Chief Justice Marshall, in *Wooster* v. *State of Georgia*, 6 Peters 515, the courts have uniformly recognized the supreme power of Congress in dealing with Indians and have avoided attempts to modify Acts of Congress or even inquire into the purposes of Congress in legislation respecting Indians and their property.

That Congress had authority and power to grant to Petitioners and their ancestors such recognition and rights as would entitle them to share in the proceeds arising out of the sale of their tribal lands in Iowa and Kansas under the Treaty of June 5-17, 1846 (supra) and the sale of the surplus lands under the treaty of 1861 (12 Stat. 1191) is no longer open to question, nor is the right to exercise that authority without interference or interpretation by the Judiciary such as is required by the Court of Claims in the present case. That Court, itself, said in *Cherokee Nation* v. *U. S.* 92 Ct. Cls. at page 266:

> "It cannot now be denied that Congress possesses authority to determine the extent and manner of the distribution of tribal property among the members of the tribe and to legislate in reference to tribal property in any manner and to any extent it deems proper for the benefit of the tribe."

This Court said in *Stephens* v. *Cherokee Nation* 174 U. S. at page 445 that the right of Congress to determine tribal membership is included in the plenary power of Congress to "determine the extent and manner of the distribution of tribal property." The Supreme Court also said in *Cherokee Nation* v. *Hitchcock*, 187 U. S. L.C. 307:

> "The holding that Congress had power to provide a method for determining memberships in the five civilized tribes and for ascertaining the membership thereof, preliminary to determining a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive."

This Court said, *United States* v. *Holliday*, 70 U. S. at page 418, after discussing Indian and Indian tribal rights or status:

> "It follows from these propositions, which seem to be incontrovertible that if commerce or traffic or intercourse is carried on with an Indian tribe or with a member of such tribe, it is subject to be regulated by Congress, * *. The right to exercise it in reference to any Indian tribe or any person who is a member of such tribe is absolute, * *."

L.C. 419:

> "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, * *. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians then, by the Constitution of the United States they are placed, for certain purposes, within the control of the laws of Congress. * *"

The rule firmly announced by the above quotations from this Court clearly covers the three Acts of Congress (1864, 1906, 1913, supra) and every transaction that resulted in the payment of $447,339 to the Potawatomis of Wisconsin as their share of the tribal property due them pursuant to the sale of tribal property in 1846 (9 Stat.

853) and the sale of the tribal surplus properties in 1861 (12 Stat 1191) as shown by House Document No. 830 (Apx. 89-93A).

The same doctrine was announced by this Court in a later case, *Lone Wolf* v. *Hitchcock*, 187 U. S. at page 565:

> "Plenary authority over *tribal relations* of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." (Emphasis supplied)

This doctrine of the Supreme Court denies to the Court of Claims and to the Indian Claims Commission the right to do anything other than to follow the action of Congress when it distributed a portion of the consideration derived from the sale of Potawatomi tribal lands to Petitioners and their ancestors. This doctrine places upon the Court of Claims and likewise the Indian Claims Commission the duty to include Petitioners in the distribution of the increased amount of the consideration as Congress did with respect to the original amount of the consideration.

This Court in the *Lone Wolf Case* L.C. 566 quoted from its decision in *United States* v. *Kagama*, 118 U. S. 375 at page 382 to the effect that by the Act of March 3, 1871 (16 Stat. 544-566) Indian tribes or nations would no longer be recognized as independent nations or powers. The treaty obligations would remain intact. Thereafter, the United States dealt with Indians by contract and through acts of Congress.

Again this Court in the *Lone Wolf Case* quotes from the *Kagama Case* in upholding the power of Congress.

Kagama Case at page 383:

> "These Indian tribes *are* the wards of the nation. They are *dependent* on the United States. * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal government

with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. * *

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary for their protection as well as the safety of those among whom they dwell." (Emphasis in original text.)

This Court in the *Lone Wolf Case* (supra) on page 568, in considering a complaint against an act of Congress of June 6, 1900 regarding the disposition of tribal property of confederated tribes (Kiowas, Camanches, Apaches) that purported to give adequate consideration for surplus lands was a controversy similar to that disposed of in *Cherokee Nation* v. *Hitchcock* (*supra*) where it was held "that full administrative power was possessed by Congress over tribal property."

The *Lone Wolf Case* involved the distribution of Indian property as do the Acts of Congress (1864, 1906, 1913, *supra*) here involved. This Court held that Congress had complete and plenary power in dealing with those Indians, and Congress surely had it in dealing with the Potawatomi Indians respecting the property and funds of the tribe here involved. The complaint against the decision of the Court of Claims in the present Potawatomi case falls clearly within the words of the *Lone Wolf Case*, (supra), page 568:

"We must presume that Congress acted in perfect good faith in dealing with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts."

Applying the above rule proclaimed many times by this Court to the reasons set up by the decision of the Court of Claims in the present case, it is clear the decision of the Court of Claims is error and should be reviewed.

SPECIFICATION OF ERROR 3A
COURT OF CLAIMS' OPINION

The Court of Claims in its opinion (Appx. 5A) asks the question:

> "was there a determination by the United States of the claims of the eastern Potawatomi Indians by appropriations to them?"

It erroneously took the position that *Acts of Congress* did not recognize Petitioners' right to participate in all annuities, trust funds and moneys and all other assets arising out of the Treaty of 1846 because (Op. p. 9, Appx. 10A)

> "Nothing has been found, in spite of careful search, to show that these appropriations were made because of any determination by representatives of the Government, that the non-emigrant Potawatomies had a right to share in the proceeds of the western lands as a matter of tribal custom or through the exercise of federal power over the division of tribal funds."

That statement is wholly error and a disregard for the constitutional power of Congress and the decisions of this Court because,

1. No such determination by a government representative was necessary; Congress could and did make that determination itself. The Court, in its opinion, page 5, (Appx. 6A) states:

> "We accept as sound the stated rule that the United States may make such determination of property right."

The opinion then cites several cases in which that power of *Congress* was sustained. (This concerned only the

power of Congress). To those cases cited should be added, *Lone Wolf* v. *Hitchcock* (supra); *Holliday* v. *U. S.* (supra) and *United States* v. *Kagama* (supra) and the other cases cited above.

Congress did make a determination of the interest of Petitioners and recognized their right to participate in the annuities, trust funds and moneys of the Potawatomi tribe arising out of the Treaty of 1846 because by the Act of June 30, 1913 (supra) (Appx. 49A) it did grant to Petitioners and their ancestors $447,339

> "the said sum last named being the proportionate share of said Indians of annuities and moneys of the Potawatomi tribe in which they have not shared, as set forth in House Document Numbered Eight hundred and thirty."

and in the same act, authorized the Secretary of Interior to expend $150,000 of that sum in buying lands in the States of Wisconsin and Michigan as a reservation for those Indians. It is clear, that reservation was purchased in accordance with the Act of Congress of 1864 (supra). The $447,339 was granted to Petitioners and their ancestors pursuant to the Act of 1906 (supra) (Appx. 48A).

2. Although unnecessary, a Government representative did, pursuant to the Act of 1906 (Appx. 48A) determine that Petitioners and their ancestors *did* have an interest in western lands, and it is clear that the Court of Claims in its opinion overlooked or disregarded the definite and positive evidence of that determination.

House Document No. 830, 60th Cong., 1st Sess. (Appx. 79A) (pp. 1 to 12 incl; Gov. Exh. 41) is a report of the Secretary of Interior of April 1, 1908. Congress by the Act of June 30, 1913 supra) definitely made House Document No. 830 a part of that Act. That Act (1913) definitely established and fixed the interest of the Potawatomi Indians of Wiconsin in "all annuities, trust funds

and moneys" of the Potawatomi Tribe. The total sum of $447,339 was paid out to those Indians in accordance with the tenor of the claims of the Potawatomi Indians of Wisconsin set out in their memorial, Senate Document No. 185, 57th Cong. 2nd Sess., filed in 1903 (Appx. 56A). House Document No. 830 (supra) was made by the Secretary of Interior pursuant to an investigation of the claims of Petitioners as set out in Sen. Doc. No. 185. The payment of the money (Act of Cong. 1913) to the Potawatomi Indians of Wisconsin in accordance with those Documents (Sen. No. 185; House Doc. No. 830, supra) is a most solemn determination and recognition of the interest and rights of the Wisconsin Potawatomi Indians.

The words of the Secretary of Interior also clearly confirmed the determination when he said (H. Doc. No. 830, p. 9, Appx. 91-95A):

> "Fractional part *due* the Wisconsin band, * * which amount to $41,961.85." (Emphasis supplied).

Page 10:

> "Amount *due* the Wisconsin band $480,943.93." (Emphasis supplied)

Page 11:

> "Fractional part *due* the Wisconsin band 1925/5432." "Proportionate share of the Wisconsin band $156,427.43." (Emphasis supplied)

Page 12:

> "Statement No. 6."
>
> * * "Although the act of March 1, 1907 (34 Stat. 1031), specifically provides that the balance of the $230,064.20, appropriated by it, shall be paid to the 'members of the Pottawatomie tribe of Indians in Kansas,' it is believed that the equitable right of the members of the Wisconsin band to share in the payment of this balance is as great as their right to share in the other portion of the $643,000 principal; hence this statement is made to include the entire amount of said principal.

> The number of claimants is taken in conformity with the estimate made in statement No. 4, showing the fractional part *due* the Wisconsin band to be 1925/5432/ (Emphasis supplied)
>
> 1925/5432 of $643,000 equals $227,866.10."

The total of the above amounts *due* the Potawatomis of Wisconsin was determined to be $1,964,565.87. The Court said (Op. p. 8, Appx 8A):

> "The sum included a proportion of the trust income from the receipts of the sale of the Iowa and Kansas lands involved in this case."

The words "their proportionate share", "the amounts due them", "fractional part due", etc., used in the Acts of Congress are direct commitments by Congress that Petitioners and their ancestors owned and had an interest in the annuities, trust funds and other moneys of the Potawatomie tribe. For that, and for no other reasons, Congress paid the amount it determined was *due*. The Court of Claims had no authority, legal or equitable, to interfere with, modify or change the meaning of those words.

The proportionate share of the Potawatomi Indians of Wisconsin then residing in Canada (numbering 1550) was included in the above amount ($1,964,565.87). Those Potawatomis in Canada were denied a right to recover because of Canadian citizenship. Congress then determined the amount *due* the 457 Potawatomis living in Wisconsin was $447,339. (Op. p. 8, Appx. 8A). That amount was paid to Petitioners and their ancestors pursuant to the Act of June 30, 1913 (supra).

SPECIFICATION OF ERROR 3B

The Act of June 30, 1913 (supra) is very important and the Court of Claims was bound to follow it. The appropriation Acts that followed that act by which the *remainder* of the $447,339 was distributed to Petitioners

and their ancestors were all entirely dependant upon the 1913 Act, without which there could have been no appropriations. (See Appropriation Acts, Appx. 49-54A). The Court was grievously in error when it avoided the 1913 Act by leaning upon one appropriation Act only, that of 1928 (45 Stat. 901, Appx. 54A). The money appropriated by that Act had, in 1913, been placed to the credit of the Potawatomis of Wisconsin so that it was the Wisconsin Potawatomi Indians' own money that was appropriated in 1928.

In discussing the final appropriation Act (45 Stat. 901), the Court said (Op. p. 8 Appx. 9A):

> "The final appropriation of the moneys reported as the proportionate part of the above Potawatomi funds, not shared in by the Wisconsin tribe, was made May 29, 1928, 45 Stat. 901, in these words:
>
> > 'For the Wisconsin Pottawatomie Indians of Wisconsin and Michigan, $6,839, this sum being the unappropriated balance found due said Indians under the treaty of September 27, 1833 (Seventh Statutes at Large, page 442) and the Act of June 25, 1864 (Thirteenth Statutes at Large, page 172): * * *"

In construing that appropriation act, the Court made the following arbitrary and incorrect statement; "This referred, of course, to the Chicago treaty for the sale of eastern lands."

The next statement of the Court is incompatible with it when it says:

> "The explanation, Hearing, Second Deficiency Appropriation Bill 1928, 70th. Cong. 1st. Sess., 317, shows clearly that this was an appropriation to *disburse the balance of the $447,339* mentioned in 38 Statutes." (the 38 Statutes is the Act of 1913, supra) (Emphasis supplied)

Since it "shows clearly" that the appropriation was made "to disburse the balance of the $447,339 mentioned

in 38 Statutes" the appropriation could not refer to the Treaty of September 27, 1833 and the Act of June 25, 1864 (Appx. 48A) *alone*, because the Act of 1913, (38 Stat. 102) as shown above was based upon and included (as the Act itself shows) all annuites, trust funds and moneys of the Potawatomi Tribe, so that when the money was appropriated to disburse the balance of "the $447,339" it was disbursing the balance of that amount of money set out and determined pursuant to House Document No. 830 which is part of the Act of 1913 (Appx. 49A)

SPECIFICATION OF ERROR 3C

Charge Against The Western Potawatomis

The Court (Appx. 10A) follows the opinion of the Commission and states the amount so paid to the Potawatomi Indians of Wisconsin was not made a charge against any past, present or future claims the western Potawatomis had against the Government. That is not a qualification available for use by the Court for any purpose. The Government negligently failed to retain a proportionate share of annuities in the Treasury as required by the Act of 1864 (supra) and Congress had to appropriate money from the public funds because all annuities due the tribe had been commuted and distributed per capita to the western Indians (36 Stat. 269 (1910), Appx. 55A) and all the trust funds had been distributed to the western Potawatomies under 35 Stat. 20, (1907), and there were no tribal funds, "either past, present of future" against which a charge could be made at the time of the Act of 1913 (supra). (Def. Exh. 56, pp. 20-23; 33, 34, Statement No. 1; Gov. Finding of fact No. 19, Def. main Br. before the Indian Cl. Com. p. 31, note 44, "No tribal funds then being available for this purpose.") Also the western Indians had become divided and scattered pursuant to the Treaties of 1861 12 Stat. 1191 and 1868 (15 Stat. 531) most of them became citizens and abandoned the tribe. A further and more effective reason is found in the plenary

power of Congress to deal with Indian property as was said by this Court under a similar issue, in *Lone Wolf* v. *Hitchcock* (supra) p. 568:

> "In any event, as Congress possessed full power in the matter, the judiciary cannot question nor inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the Courts."

The statements of the Court of Claims and the Indian Claims Commission are contradicted by House Document No. 830 (supra) and Int. Exh. No. 82, House Report No. 4082, 58th. Cong. 3rd. Sess. page 3 (Appx. 99A) which states:

> "The same situation of failure (Dept. of Int. failure to comply with the law of 1864, supra) was found as to the stray bands of Winnebagoes."

which resulted in the Act, 21 Stat. 315, under which the amount due the Winnebagoes of Wisconsin was determined by Congress, recouped from the Winnebagoes who had emigrated west of the Mississippi River, and paid to the Wisconsin Winnebagoes. At the time of this action, 1881, the Winnebago Tribe in the west still was possessed of funds and property, a condition that did not exist as to the Potawatomi Nation in 1913. The House Report, No. 4082, states, page 3:

> "Your committee finds that the claims of the Potawatomi Indians of Wisconsin is in every respect similar to that claim of the Winnebagoes of Wisconsin, adjusted under the law last mentioned." (21 Stat. 315).

Thus, the legislative history of the Act involved definitely established that the purpose of the legislation was to recognize the right and interest of the Potawatomi Indians of Wisconsin to share in the tribal property which

had theretofore been denied them. This is correctly stated in the Government's brief before the Indian Claims Commission (p. 252):

> "Congress has since corrected this situation by fully recognizing the members of the Wisconsin band of Potawatomi Indians as full fledged members of the Potawatomi Tribe, and entitled as such to a share fully on a pro rata basis in all tribal annuities, assets and funds accruing to the tribe subsequent to 1833, including specifically the proceeds arising from the sale of ceded lands."

Recognition of Petitioners and their ancestors as part of the Potawatomi Tribe entitled to share in tribal funds, differentiates this case from such cases as *Shoshone Tribe* v. *U. S.* 349 U. S. 74, in which cases the contending groups of Indians were never recognized as part of the same tribe that originally owned the land involved.

SPECIFICATION OF ERROR 3D

Court Requires Judicial Hearing

In its opinion (Appx. 11A) the Court said:

> "The western Potawatomies were never brought into a hearing or suit where their right might be considered."

It is clear that the Court of Claims and the Indian Claims Commission (4 Ind. Cls. Com. p. 537) (Appx. 46A) concluded that a judicial review or congressional hearing should have been provided by Congress before Congress determined and distributed the proportionate share *due* the Potawatomi Indians of Wisconsin if the payments to the Wisconsin Indians were to be an effective recognition of an interest in the tribal funds. That conclusion and the statements of the Court and the Indian Claims Commission are a direct encroachment and a limitation upon the power of Congress which will constitute a precedent if it is to become a final determination of the judiciary.

The issue involved in granting the Potawatomis of Wisconsin relief by the three Acts of Congress (1864, 1906, 1913) was clear and definite and entirely a political question. No issue was involved requiring a judicial hearing.

There is no rule, law or regulation that limits the power of Congress in making such an adjustment respecting Indian property, and the Court cannot prescribe such a rule. The Court cites, *Eastern Band of Cherokee* v. *Cherokee Nation* (supra) as authority for a hearing. In that case a *jurisdictional* act had previously been enacted authorizing the Court to resolve tribal differences so that the "absolute" power of Congress was not involved in that decision. It is no authority here.

The Winnebago Indians in the west were never brought "into any proceeding" or given any notice of the claims of the Wisconsin Winnebagoes, before Congress, in 1881 (21 Stat. 315) determined and recouped from the western Winnebagoes, the proportionate share of the Wisconsin Winnebagoes, that theretofore had been paid to the western group, and paid it over to the Wisconsin Winnebagoes. (Int. Exh. 82, Appx. 99).

Twenty-two years later, the claim of the Wisconsin Potawatomi Indians arose. It involved no issues requiring judicial review and "it was adjusted" by Acts of Congress. Congress had before it House Document No. 830 when the legislation was passed. As in the Winnebago case (supra), judicial review was clearly not required.

SPECIFICATION OF ERROR 3E

Appropriations Were Not Gratuities

The Court of Claims states (Op. p. 9, Appx. 10A) that the Wisconsin Potawatomi Indians had been a source of difficulty and by the Act of 1864 (supra) Congress made provisions for the stray bands in Wisconsin. The Court

(Op. p. 10, Appx. 11A) adds to that observation by quoting from the opinion of the Indian Claims Commission with respect to the Acts of 1864, 1906 and 1913 (supra) as follows:

> "In essence the congressional action was a final disposition of a troublesome problem resulting from the presence of those nonmigrating Indians in the east rather than a recognition of their rights as former members of the migrating bands."

This observation of the Court and the statement of the Indian Claims Commission quoted is clearly tampering with the plenary powers of Congress to enact the legislation for the Potawatomi Indians of Wisconsin. It cannot be inferred from the words of the legislation or the legislative history. The Court of Claims and the Indian Claims Commission, in their decisions, could not and should not have inquired into the motive of Congress in passing that legislation. Therefore, the statement of the Court of Claims and the Indian Claims Commission quoted above are only the Court's inference and clearly arbitrary without any Findings of Fact to support them but in any event, they can not be used in determining the issue here. Attention is again directed to the words of this Court in *Lone Wolf* v. *Hitchcock* (supra) at page 568:

> "The judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."

The Court (Op. p. 10, Appx 11A) approves the words of the Indian Claims Commission: "in essence, the congressional action was a final disposition of a troublesome problem", and the Indian Claims Commission further said (Op. 4 In. Cls. Com. 538): "Congress has the power to make such gratuitous appropriations." If that be true, why did Congress by three different statutes and years of investigation determine to the penny $1,964,565.87, the

amount that was "due the Wisconsin Potawatomis." The Commission made no findings of fact to support a conclusion that the appropriations were "gratuitous". If a finding of fact on this point were made, it would have to show that Congress often made "round figure" contributions to the Potawatomis of Wisconsin. The following are some of those contributions: June 25, 1864 (13 Stat. 172) $10,000; March 3, 1865 (13 Stat. 560) $10,000; July 26, 1866 (14 Stat. 465) $5,000; March 2, 1867 (14 Stat. 514); July 27, 1868 (15 Stat. 221); April 10, 1869 (16 Stat. 40).

For the Indian Claims Commission and the Court of Claims to say that the $447,339 paid to the Potawatomi Indians of Wisconsin as described above was a gratuity to the Indians, is to charge that Congress quibbled in legislating and resorted to a subterfuge in the exercise of its power to deal with the Potawatomis of Wisconsin. The decisions in *United States* v. *Holliday* (supra) and *Lone Wolf* v. *Hitchcock* (supra) discussed above would have been in the reverse if this Court had exercised the authority or power the Court of Claims did in this present case.

SPECIFICATION OF ERROR 3F

Recognition

The Court of Claims (Op. p. 12 Appx. 14A) Agrees:

> "Appellants' ancestors have been found to have been members of recognized groups of Potawatomies at the time of the treaties of September 26, 27, 1833, 7 Stat. 431, 442, concerning the Iowa land, and of February 11, 1837, concerning the Kansas land. At that time they were entitled to participate in the annuities and to emigrate with their fellow Potawatomies to the West."

Although ancestors of Petitioners did not migrate to the west (and many who did migrate returned), they were not strangers to the transaction by which their tribe ac-

quired the lands in Iowa and Kansas and the Petitioners now stand in a like position with respect to the award made by the Indian Claims Commission in 1956. The Act of Congress of 1864 (Appx., p. 48A) clearly recognized that those Wisconsin Potawatomi Indians were entitled to their proportion of their tribal property to be paid to them "when they shall be united with their tribe." Congress also said in the same act that in the event they did not join their tribe, their proportionate share would be used "in settling or subsisting them on any other reservation that may hereafter be provided for them."

To say that the above words and the whole act of 1864 is anything less than a plain definite recognition of the rights of the Wisconsin Potawatomi Indians is arbitrary and capricious. This conclusion is well founded in view of the statement of the Indian Claims Commission (4 Ind. Cls. Com. 536, Appx. 45A) that was erroneously affirmed by the Court of Claims:

> "We have referred to the 1864 act above * *. Instead of a recognition of Intervenors' (Wisconsin Potawatomi Indians) rights to share in the award herein it would appear that an attempt was made by that act to deprive the Potawatomi Nation of funds vested in that nation by treaties—*questionable action to say the least.* * *" (Emphasis supplied.)

As respects the above quote from the Indian Claims Commission, it is clear that the Commission and the Court of Claims overlooked or disregarded the statement of this Court (in a similar situation): *Lone Wolf* v. *Hitchcock* L.C. 568:

> " * *. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. * *"

Congress did not stop with the Act of 1864, and Petitioners do not rely alone thereon because in 1903, Peti-

tioners and their ancestors filed another memorial (Sen. Doc. 185, Appx 56A) demanding further consideration of Congress. A principal reason for renewing their demand was the decision of this Court in 1898, in *New York Indians* v. *U. S.* (170 U. S. L.C. 25), which decision was particularly referred to in Petitioners' memorial (Sen. Doc. 185, Appx. 75A). In the *New York Indian* Case, this Court eliminated the question of forfeiture that had theretofore been given as a reason for denying Petitioners their share of the tribal property because they had refused to move west of the Mississippi River. This Court sustained the right of the New York Indians who refused to move to lands in Kansas granted to them under penalty of *expressed* forfeiture (7 Stat. 550). The decision gave to the New York Indians the value of their Kansas lands although they never emigrated thereto.

On the strength of that decision involving a treaty (providing *forfeiture*) far more against the New York Indians than the Potawatomi treaties, the Interior Department recognized it had been in error in ignoring the Act of 1864 (supra) by assuming a forfeiture. (Hearings, Sub.Com, Ind. Affairs, House of Rep. Int. Exh. 79, p. 13). It established for Petitioners and their ancestors a right not theretofore recognized. It gave to Congress a basic reason for further legislation.

Thereupon, pursuant to the memorial (Sen. Doc. 185) Congress passed the Act of June 21, 1906 (supra) specifically directing the Secretary of Interior to report on six (6) points, one of which, No. 3 directly related this Act to the Act of 1864 (supra). Under point No. 2, he was to report:

> "*Their proportionate shares of annuities, trust funds and other moneys paid to or expended for the tribe to which they belong*, in which the claimants (Potawatomi Indians of Wisconsin) have not shared." (Emphasis supplied)

Those words are a plain definite statement adopting as a fact that petitioners and their ancestors were entitled to share in annuities, trust funds and other moneys of the Potawatomi Tribe.

On April 1, 1908, Secretary of Interior Garfield filed a report in great detail stating what "was due" the Potawatomi Indians of Wisconsin. (H. Doc. No. 830, Appx. 79A). The Court of Claims, in its opinion (pp. 7, 8-Appx 8A) states:

> "In that detailed report it was determined that the the proportionate shares of the Potawatomis of Wisconsin in the annuities, trust funds and other moneys expended for the tribe and not shared in by them was $1,964,565.87."

The Court of Claims uses the words of Congress, "their shares". Those words in the statute and of the Court of Claims express in the clearest way an interest and right in property that cannot be controverted by inference. The Court of Claims agrees (Op. p. 8, Appx 8A) that the sum included a proportionate share of the trust funds arising from the sale of tribal lands in Iowa and Kansas in 1846.

The action of Congress in legislating with respect to the memorial (Sen. Doc. 185) filed by Petitioners in 1903, not only showed intention to recognize the interest of Petitioners and their ancestors but Congress did actually recognize by the legislation (Act of 1906, supra) that Petitioners and their ancestors had an interest in their tribal property. Congress by its action intended to and did procure for them their share in tribal property. That Congress did and did intend to recognize the interest of Petitioners and their ancestors is confirmed by the later Act of Congress, June 30, 1913 (supra). The statement of the Court of Claims (Op. p. 10, Appx. 11A) and the Indian Claims Commission are arbitrary and erroneous in addition to being beyond the power of the Court to make.

SPECIFICATION OF ERROR 4

Membership in Tribe

The Court of Claims discussed at length (Op. pp. 10-17, Appx 14A, 19A) the question of membership of Petitioners and their ancestors in the Potawatomi tribe as of 1846. The Court erred in its conclusion, because that issue was answered by Congress when it recognized and paid Petitioners their share of the tribal funds as set out above. The Court failed to realize that no act of Congress nor the plenary power of Congress was involved in the cases cited and relied upon by the Court; *Cherokee Trust Funds* 117 U. S. 288; *Eastern Band of Cherokee* v. *U. S. and Cherokee Nation* 20 Ct. Cls. 449; *United States* v. *Cherokee Nation* 202 U. S. 101; *Pam-to-pee-set al.,* v. *U. S.* 148 U. S. 691; *Potawatomi Indians* v. *U. S.* 27 Ct. Cls. 403.* Congress authorized the Courts to act in those cases. In the present case, Congress itself acted. If any authority is claimed by reason of the cases cited, it must be subordinated to the Acts of Congress; *Lone Wolf* v. *Hitchcock* (supra). In failing to consider the distinction between the cases cited by the Court on which it relied, and the present case, the Court erred and did a great injustice to Petitioners.

This error of the Court of Claims and the Indian Claims Commission creates another precedent by which the judiciary will limit the plenary power of Congress and overrule decisions of this Court.

THE POSITION OF THE GOVERNMENT

The Court of Claims (Op. p. 9, Appx 10A) states:

> "Reference should be made to the position of the government before the Indian Claims Commission and on this appeal."

* The Jurisdictional Acts for the respective cases are: 22 Stat. 585 (1883); 22 Stat. 585 (1883); 32 Stat. 762 (1906); 26 Stat. 24 (1890); 26 Stat. 24 (1890).

The Court then states that by its brief before the Court, the Government interprets the action of Congress as "a clear recognition" of the rights of the Potawatomis of Wisconsin to participate per capita in all annuities, trust funds and moneys and all assets arising out of the Treaty of 1846 (supra). The Court made no comment and gave no answer to the Government's position.

The Government introduced evidence before the Indian Claims Commission including its exhibit 40, which is Sen. Doc. 185, and exhibit 41 which is House Doc. 830 supra, and proposed findings of fact (Gov. Br. before Ind. Cls. Com. (pp. 24-35) opposing the motion to dismiss the intervening petition and supporting the Intervenors, Petitioners here.

Here there is a clear conflict of decision which this Court should settle in this case.

CONCLUSION

Petitioners urge this Court to grant certiorari in this case to review the decision of the Court of Claims to prevent a limitation of the constitutional power of Congress to legislate with respect to Indians and Indian property and to right a wrong done Petitioners in the proceedings below, or said rights, recognized by Congress, will forever be lost to these Indian wards of our Government.

Respectfully submitted,

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On the brief.

APPENDIX TO PETITION

OPINION OF COURT OF CLAIMS

This is an appeal from an order of the Indian Claims Commission, 60 Stat. 1049. The order entered September 19, 1956, 4 Indian Claims Commission 515, 539, is one dismissing an intervening petition of the Hannahville Indian Community et al. filed in the there-pending consolidated case of the Prairie and Citizen Bands of Potawatomi Indians et al. against the United States. The appeal was filed under Section 20 (b) of the Indian Claims Commission Act.[1]

On the same day, the Commission entered an interlocutory order, 4 Indian Claims Commn. 460, 472, awarding the "Potawatomi Nation, as created by the treaty of June 5, 17, 1846, and as it then existed," $3,290,217.

Although there are still pending in the Commission proceedings for accounting, we think the appeal here is allowable under the above jurisdictional section. The order to dismiss the intervention is completely severed from the main proceeding. The intervenors have no voice in the claim of the Potawatomies against the United States. Their claim was "that they be permitted to participate in any judgment or award granted [the Western Potawatomie] and share equally in the proceeds of such award or judgment."[2] Finality of adjudication has al-

[1] "(b) When the final determination of the Commission has been filed with the clerk of said Commission the Clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination." 60 Stat. 1054.

[2] This case differs from Ingraham Billie et al., as General Council of the Miccosukee Seminole Nation v. Seminole Indians

ways been insisted upon in the federal courts before appeals are allowed, but some collateral issues may "become so severed . . . as to permit an appeal."[3] The present appeal is of that type. Like *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545, a case of appeal from a ruling of the United States Court of Appeals for the Third Circuit requiring a bond to protect a corporate defendant against costs in a derivative suit against a corporation by a stockholder, this appeal has a "final and irreparable effect on the rights of the parties." The Supreme Court said in the *Cohen* case, p. 546:

> "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

We think that is the situation here. This court has passed, sub silentio, upon such a controversy, *McGhee* v. *The Creek Nation*, 122 C. Cls. 380.

In the *Cohen* case any judgment against the corporation could have been appealed because of an error in not requiring bond, but instead the appeal was allowed before judgment. Here, the Commission could have dismissed the petition for intervention as a matter of discretion. See *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, 140. Instead, the Commission made a final determi-

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of Florida, 137 C. Cls. 161, where there was not a final order determining a positive legal right of the appellant. There it was sought by appellant to quash petitions on the ground that the movant had title to the land involved in the pending suit. It was there recognized that an order may be final even though it only "finally disposes of a collateral issue." See also Caddo Tribe of Oklahoma v. United States, app. No. 1-57 decided October 9, 1957, where interlocutory order granted only partial relief.

[3] Baltimore Contractors v. Bodinger, 348 U. S. 176, 179. See Cobbledick v. United States, 309 U. S. 323, 328.

nation of intervenor's rights from which a res judicata status of their claim might reasonably follow. See 4 Indian Claims Commn. 537. This we think distinguishes this case from *Ex Parte Cutting*, 94 U. S. 14, 20. This appeal is distinguished from that in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 314 et seq., because the "legal right to intervene" in that case depended upon a "future possibility," contingent and speculative. Hence there was no standing. The final determination of intervenor's rights brings this appeal more closely to the situation in *Pipe Line Co.* v. *United States*, 312 U. S. 502, 506, where there was a judgment that allowed the party attempting intervention to safeguard its private interests. In that situation it was held the right to intervene was not discretionary.

The suit in which appellants' motion to intervene was filed was brought before the Commission by two bands of Potawatomi Indians—the Prairie Band of Kansas and the Citizen Band of Oklahoma—in two separate petitions. Both claim their right of action is derived from the fact that they are the sole possessors of the rights of the Potawatomi Nation, reinstated in its national character by the Treaty of Council Bluffs, Iowa, and the Osage River, Kansas, June 5 and 17, 1846, 9 Stat. 853. There is no dispute here as to their rights or their derivation.

These appellee bands in the name of the Potawatomi Nation seek recovery from the United States for the difference between the agreed amounts paid their Nation by the United States under the western treaty aforesaid and the then value of the Iowa tract of five million acres, acquired under the treaty of Chicago by the United Nation of Chippewa, Ottawa and Potawatomi Indians, September 26 and 27, 1833, 7 Stat. 431, 442, and a treaty concluded at Washington February 11, 1837, 7 Stat. 532, for the Osage River lands. These treaties conveyed Potawatomi lands east of the Mississippi to the United

States. The tribes agreed to move west. An interlocutory order adjudging over three million dollars to petitioners has been entered by the Indian Claims Commission, as above indicated, for the Potawatomi Nation on the ground that the amounts paid in 1846 were grossly unconscionable in relation to the then value of the land. 4 Indian Claims Commn., Pt. 2, p. 471. (The appellants sought intervention which was denied.) Appellants are descendants of Potawatomi Indians who occupied lands in Wisconsin, Illinois and Michigan ceded to the United States under the above two treaties. Their ancestors thereby acquired a right to go to one or the other tracts of land west of the Mississippi.

Appellants' contentions are, first, that the various tribes or bands of Potawatomies in the early ninteenth century constituted an "overall political entity" owning all tribal property "including the lands ceded" by the two above treaties and therefore, whether "affiliated," i. e., members of the present Potawatomi Nation, or not, or whether organized into a tribe or not, appellants are entitled to a proportionate share of any award from the Commission. Second, appellants say that Congress has recognized their right by certain appropriation acts for the relief of Potawatomi Indians. This recognition is said to be conclusive in any distribution of tribal assets.

As to the first contention, in our view of the controlling facts in this case as to membership, it is immaterial whether the Potawatomies in the East were a single tribe or many bands. Appellants' rights would be the same. The treaties were made under many different names, usually geographic or descriptive in form as in the Greeneville, Ohio, treaty of 1795, Potawatomies of the River Saint Joseph., 7 Stat. 49. See the list of Land Cession Treaties in the reports of the Indian Claims Commission, Vol. 4, Pt. 2, p. 512. The very treaties following the Chicago Treaty of 1833 show that the "United

Nation of Chippewa, Ottawa and Potawatomie" could not pass title, as we know it, to all Potawatomi land.[4] The question of the autonomy of the various bands of Potawatomi who roamed Ohio, Michigan, Indiana, Illinois and Wisconsin in the early years of the last century was fully examined and determined by the Indian Claims Commission, Vol. 4, Pt. 2, pp. 517-524. They reached this conclusion:

> "The above transactions with Potawatomi Indians show beyond doubt that the Potawatomi people, at the time of the treaty of 1833 and the treaty of 1837, was composed of numerous autonomous groups who in their land dealings with defendant acted independently of each other and as autonomous entities."

We agree with that conclusion from the facts found.

We therefore first discuss the question of recognition by Congress of the rights of the intervenors and then the question of continuing membership of intervenors in the Potawatomi Nation after its removal to the West.

Was there determination by the United States of the claims of the Eastern Potawatomi Indians by appropriations to them? Appellants argue that certain appropriations for the benefit of the Potawatomi of Wisconsin evidenced a recognition by the Congress of the right of all Potawatomi, whether or not they emigrated west, to share in the proceeds of the Iowa and Kansas lands. Their point is that since Congress has power to determine who are members of a tribe entitled to receive the funds or lands of a tribe, congressional appropriations,

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[4] See Treaty of Com-o-za and his Band, December 4, 1834, 7 Stat. 467; Treaty of Logansport, Indiana, December 17, 1834, 7 Stat. 469; Treaty of Turkey Creek, Indiana, March 26, 1836, 7 Stat. 490; Treaty of Tippecanoe River, April 11, 1836, 7 Stat. 499; Treaty of Yellow River, Indiana, August 5, 1836, 7 Stat. 505; Treaty of the Pottawatomie Indians of the Wabash, September 23, 1836, 7 Stat. 515.

under the circumstances of the payments now to be discussed, must be accepted here as a determination of appellants' right to share in this award. We accept as sound the stated rule that the United States may make such determinations of property rights.[5] The Commission could find from the record no identifiable group of these Indians who went West and then returned East, nor have we.[6] Therefore we pass only upon claims arising from tribes or persons continuously residing east of the Mississippi.

Appellants' claim of recognition is based on several enactments. The Act of June 25, 1864, 13 Stat. 169; of June 21, 1906, 34 Stat. 380; and of June 30, 1913, 38 Stat. 102. The 1864 Act, so far as pertinent, is an appropriation "for fulfilling treaty obligations" of the United States to the Potawatomies arising from various treaties with different tribes from August 3, 1795, through September 26, 1833. It was a general appropriation act for many tribes. The Potawatomies were not subdivided into groups or tribes except that provision was made separately for the Potawatomies of the Huron. A proviso, 13 Stat. 172, is revealing of the then attitude of the Government towards the non-migrant Potawatomies. It reads:

> "That the proportion of annuities to which said stray bands of Pottowatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the treasury to their credit, from year to year, to be paid to them when they shall unite

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[5] 30 Stat. 90; Stephens v. Cherokee Nation, 174 U. S. 445, 488; Cherokee Nation v. Hitchcock, 187 U. S. 294, 306; 25 U. S. C. § 163. Cohen, Handbook of Federal Indian Law 98. Cf. Roff v. Burney, 168 U. S. 218, 222; Chippewa Indians of Minn. v. United States, 88 C. Cls. 1, 28; 307 U. S. 1. Cohen, Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 160 et seq.

[6] Indian Claims Commn., Vol. 4, Pt. 2, p. 529.

> with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling and subsisting them on any other reservation which may hereafter be provided for them."

Such language indicates rather a requirement of tribal integration west of the Mississippi. Apparently this was not carried out. H.R. Doc. No. 830, 60th Cong., 1st Sess., p. 3.

Evidently the Wisconsin Potawatomies did not go West or receive any part of the annuities payable to any Potawatomies between 1833 and 1903. In 1903 the Potawatomi Indians of Wisconsin filed a Memorial. S. Doc. No. 185, 57th Cong., 2d Sess. It asked consideration of their claims for their proportionate share of tribal annuities and interest on trust funds of the Potawatomi Nation. Their claims had been denied by the Department of the Interior. Before the Department they claimed rights under the treaty of September 26, 1833, at Chicago, 7 Stat. 431. They did not claim under the Articles Supplementary, p. 442, or the exception, p. 445, for certain Indians because "of their religious creed." The Commissioner refused consideration in these words:

> "As a matter of fact, the Wisconsin Pottawatomies have no claim under the treaty of 1833. They give as an excuse for not complying with the stipulations thereof that the making of the treaty was by a few and not understood by the majority, and many refused to remove and thereby forfeited their rights. There is nothing this office can do in the matter." S. Doc. No. 185, supra, p. 2.

In 1906, 34 Stat. 325, 380, the Congress enacted the following paragraph in the act for contingent expenses of the Indian Department:

> "That the Secretary of the Interior be, and he is hereby, directed to cause an investigation to be made of the claims of the Pottawatomie Indians of Wis-

consin, as set forth in their memorial to Congress, printed in Senate Document Numbered One hundred and eighty-five, Fifty-seventh Congress, second session, and to report thefeon to Congress at the beginning of the next session thereof, showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the treaty of September twenty-sixth, eighteen hundred and thirty-three, their proportionate shares of the annuities, trust funds, and other moneys paid to or expended for the tribe to which they belong, in which the claimant Indians have not shared, the amount of such moneys retained in the Treasury of the United States to the credit of the claimant Indians as directed by the provision of the Act of Congress approved June twenty-fifth, eighteen hundred and sixty-four; if none have been so retained the amount that should have been annually so retained under said law, showing also what disposition has been made of the annuities, trust funds, and other moneys of said tribe, with the amounts and the status of any now remaining to their credit in the Treasury or otherwise. He will also cause an enrolment to be made of said Pottawatomie Indians."

In response to that direction, Secretary Garfield, on April 1, 1908, filed the requested report. H.R. Doc. No. 830, 60th Cong., 1st Sess. In that detailed report it was determined that the proportionate shares of the Potawatomies of Wisconsin in the annuities, trust funds, and other moneys expended for the tribe and not shared in by them, was $1,964,565.87. This was to 1907. The sum included a proportion of the trust income from the receipts of the sale of the Iowa and Kansas lands involved in this present case. The direction did not require nor did the Secretary make a determination as to the validity of the claims.

Some years later the Congress made a determination of the shares of the Wisconsin Indians, as distinct from

the descendants of the same band in Canada and the West in these words:

> "For the purchase of allotments for the individual members of that portion of the Wisconsin Band of Pottawatomie Indians now residing in the States of Wisconsin and Michigan, $150,000, said sum to be reimbursed to the United States out of the appropriation, when made, of $447,339, the said sum last named being the proportionate share of the said Indians in annuities and moneys of the Pottawatomie Tribe, in which they have not shared, as set forth in House Document Numbered Eight hundred and thirty, Sixtieth Congress, first session, * * *" 38 Stat. 102.

Appropriations and hearings continued with references to the claims of the Wisconsin Potawatomies. At the hearings on the Indian Appropriation Bill, Mr. Meritt, Assistant Commissioner of Indian Affairs, justified a requested appropriation thus:

> "The Chairman. How much money have these Indians in the Treasury?
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> "Mr. Meritt. They have very little money in the Treasury, but they have a claim against the Government which will ultimately secure the money necessary, and this is simply drawing on that claim." P. 408, House Committee Hearings, 1914-1916.[7]

The final appropriation of the moneys reported as the proportionate part of the above Potawatomi funds, not shared in by the Wisconsin tribe, was made May 29, 1928, 45 Stat. 901, in these words:

> "For the Wisconsin Pottawatomie Indians of Wisconsin and Michigan, $6,839, this sum being the unappropriated balance found due said Indians under the treaty of September 27, 1833 (Seventh Statutes at Large, page 442), and the Act of June 25, 1864 (Thirteenth Statutes at Large, page 172): * * *".

[7] See also similar comments, House Hearing, Indian Appropriations Bill, 1917-1919, p. 372, December 1917, and p. 340, December 1918.

This referred, of course, to the Chicago treaty for sale of the Eastern lands. The explanation, Hearings, Second Deficiency Appropriation Bill 1928, 70th Cong., 1st Sess., 317, shows clearly that this was an appropriation to disburse the balance of the $447,339 mentioned in 38 Statutes.

Nothing has been found, in spite of careful search, to show that these appropriations were made because of any determination by representatives of the Government that the non-migrant Wisconsin Potawatomies had a right to share in the proceeds of the Western lands as a matter of tribal custom or through the exercise of federal power over the division of tribal funds.

As the Indian Claims Commission points out, Vol. 4, Pt. 2, p. 537, "In none of these acts was the appropriation made a charge against past, existing, or future Potawatomi funds." Had the Congress intended to determine rights, a charge should have been made against future payments to the Western members arising from tribal annuities or trusts.

Reference should be made to the position of the Government before the Indian Commission and on this appeal in regard to the appellants' right of participation in the award. As the Government states in its brief in this court, it has no direct financial interests in the division of any funds ultimately recovered by the Potawatomies in this litigation. By its brief herein, it interprets the action of Congress in these various appropritions to amount to "a clear recognition of their [Hannahville Indian Community, et al.] rights to participate on a per capita basis with the members of the appellee Prairie and Citizen Bands of Potawatomi Indians in all annuities, trust funds, moneys, and all other assets arising out of the Treaty of June 5, 17, 1846, 9 Stat. 853."

The Wisconsin Potawatomies who had not moved West had been a source of difficulty in their neighborhood. In the Act of June 25, 1864 (13 Stat. 161, 172), provision was made for these stray bands. This band continued to need help. 38 Stat. 606. The Western Potawatomies were never brought into a hearing or suit where their rights might be considered. When claimed rights of participation were made by other tribes a more judicial approach was made.[8]

We conclude that the Indian Claims Commission correctly held that these appropriations were not and were not intended to be a recognition of a right in the non-emigrant Wisconsin Indians to share in the proceeds of the Western property.

> "In essence, the Congressional action was a final disposition of the troublesome problem resulting from the presence of those non-emigrating Indians in the east rather than a recognition of their rights as former members of the migrating bands." Indian Claims Commn., Vol. 4, Pt. 2, p. 538.

Did membership of the appellants in Potawatomi tribes prior to the 1833 treaties continue thereafter so as to entitle the Eastern Potawatomi to share in the tribal benefits of the 1846 treaty concerning the Iowa and Kansas land? As our previous comments on the historical background of the Potawatomi Indians show, their tribal organization was uncertain. Some bands that participated in the treaty of Chicago of September 26 and 27,

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[8] "The Eastern Band of Cherokee Indians is hereby authorized to institute a suit in the Court of Claims against the United States to determine the rights of the said band in and to the moneys, stocks and bonds, held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi River, and also in a certain other fund, commonly called the permanent annuity fund, to which suit the Cherokee Nation, commonly called the Cherokee Nation West, shall be made a party defendant." 22 Stat. 585.

1833, 7 Stat. 431 and 442, behides the Michigan Band, permitted by the treaties to remove to the northern part of the peninsula of that State, 7 Stat. 445, had members who refused to go to Iowa or Kansas.[9] While it is our opinion that the Potawatomi Indians were divided into numerous bands who acted independently in ceding land to the United States, the existence of non-migrant Indians, members of bands that did join in the exchange for Western lands and who ask now for participation in this recovery, require us to determine whether a descendant of members of those bands, such as the Wisconsin or Michigan Potawatomi, petitioners here, have rights in this recovery by the Western tribes.[10] That determination will apply also to all the nonemigrant Indians, if all Potawatomies belonged to a single united nation which was the owner by Indian title or federal grant of all lands occupied by Potawatomies. We conclude that they do not have such rights and for these reasons.

At the time of the treaties that conveyed the Eastern lands, the Eastern property was used by the occupants under common rights. This is the manner in which all tribal lands were held. There were exceptions for individuals where some particular sections or a part of a section was patented to them by the United States.[11] Such titles departed from the Indian concept of use of tribal-occupied land. The unbroken rule of law from *Johnson* v. *M'Intosh*, 8 Wheat. 543, to date is that Indian title, unrecognized by the United States by treaty or

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[9] See also treaties with Potawatomi chiefs of Aug. 5 and Sept. 23, 1836, and Feb. 11, 1837, 7 Stat. 505, 515, 532, concerning Kansas land, which was receded to the United States by the Treaty of Council Bluffs, June 5 and 17, 1846, 9 Stat. 853.

[10] See Indian Claims Commn., Vol. 4, Pt. 2, pp. 514 , 525.

[11] See Treaty of Tippecanoe River, October 27, 1832, 7 Stat. 399, 400, where sections, half sections and quarter sections in Indiana were agreed to be patented to various individuals of the Potawatomies of Indiana and Michigan.

patent, covers the right to use only, a right that may be withdrawn by the Government at any time without liability for compensation.[12] This right to use the land is, however, the property of the band, tribe, or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. No instance is known of individual ownership of tribal lands.[13] Mr. Wallace testified without contradiction in this case that communal use of lands and annuities was a custom of the Potawatomies of all bands.

Since it was only members of the tribe who were entitled to the use and benefit of the tribal property, land or annuities, membership in the tribe is the touchstone to the right of individuals or groups to participate.[14]

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[12] Tee-Hit-Ton Indians v. United States, 348 U. S. 272; United States v. Tillamooks, 341 U. S. 48. Cf. Shoshone Indians v. United States, 324 U. S. 335.

[13] Delaware Indians v. Cherokee Nation, 193 U. S. 127, 137; Sizemore v. Brady, 235 U. S. 441, 442; Cohen, Handbook of Federal Indian Law 185, § 3, Eligibility to Share in Tribal Property. The Cherokee Trust Funds, 117 U. S. 288, 308: "The lands from the sales of which the proceeds were derived belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds of sales made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States. . . . Their treaties of cession must therefore, be held not only to convey the common property of the Nation, but to divest the interest therein of each of its members." 26 Op. Atty. Gen. 340, 348; 90 C. Cls. 151; 78 C. Cls. 455.

[14] Halbert v. United States, 283 U. S. 753, and cases cited, note 9. See Oakes v. United States, 172 F. 305, 307, "existing membership."

Appellants' ancestors have been found to have been members of recognized groups of Potawatomies at the time of the treaties of September 26 and 27, 1833, 7 Stat. 431, 442, concerning the Iowa land, and of February 11, 1837, concerning the Kansas land. At that time they were entitled to participate in the annuities and to emigrate with their fellow Potawatomies to the West. The treaties called for this emigration. That of September 26 was in these terms:

> "And it is further agreed that as fast as the said Indians shall be prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes.—It being understood, that the said Indians are to remove from all that part of the land now ceded, which is within the State of Illinois, immediately on the ratification of this treaty, but to be permitted to retain possession of the country north of the boundary line of the said State, for the term of three years, without molestation or interruption and under the protection of the laws of the United States."

Article 3d of the supplementary treaty of September 27 carried like meaning, as did those of August 5, September 23, 1836, and February 11, 1837, 7 Stat. 505, 515, 532. When the agreement was reached, 7 Stat. 445, for some to remain in the East, they were granted the annuities that arose from the sale of the Eastern lands but nothing more. We hold, however, that continued membership in the tribe permits participation in distribution of the Western assets. Loss of membership in the tribe brings a loss of rights in the tribal community property and of participation in the proceeds of any subsequent sale, distribution or allotment of tribal property. Loss of membership occurs through absence from the tribe.

This conclusion is reached from consideration of the authority Indian tribes possess over their membership.

We have been unable to find, through the Department of the Interior or otherwise, definite provisions as to membership in the Constitution or By-Laws of either the Citizen or Prairie Bands of Potawatomi.[15] Nor is there a showing of the requirement of membership of the United Nation of 1846, 7 Stat., or any of the Eastern tribes of the nineteenth century.

This result is supported by the case of the Cherokee Trust Funds, 117 U. S. 288. The Cherokees originally occupied the present Southeastern States. They were recognized as one people. Page 295. By treaty of July 8, 1817, 7 Stat. 156, the tribe separated into two bands, one west of the Mississippi, the other east. By this treaty the United States acquired Cherokee lands east of the Mississippi, near white settlements, and the Indi-

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[15] The Constitution and By-Laws of the Citizen Band of Potawatomi Indians of Oklahoma, approved October 17, 1938, by Harry Slattery, Acting Secretary of the Interior, reads as follows:

"ARTICLE II—MEMBERSHIP OF TRIBE

Section 1. The membership of the Citizen Band of Potawatomi Indians of Oklahoma shall consist of the following persons:

(a) All persons of Indian blood who were bona fide members of the Citizen Band of Potawatomi Indians and who were enrolled or were entitled to be enrolled on the official census roll of the Band as of January 1, 1937.

(b) All children of Indian blood born since the date of said roll, both of whose parents are members of the Tribe.

(c) Any child of Indian blood born of a marriage between a member of the Citizen Band of Potawatomi Indians and a non-member thereof who chooses to affiliate with the Citizen Band of Potawatomi Indians.

Sec. 2. The Council shall have power to prescribe rules and regulations, subject to the approval of the Secretary of the Interior, covering future membership including adoptions and the loss of membership."

No constitution or by-laws of the Prairie Band of Kansas have been found. A draft of the proposed organization of the Tribal Advisory Committee, approved June 16, 1932, by C. J. Rhoads, Commissioner, does not mention membership.

ians lands in the West. This arrangement did not solve their problems. It was supplemented first by Articles of Convention in 1828, 7 Stat. 311, and Articles of Agreement and Convention of February 14, 1833, 7 Stat. 414. These agreements gave the Cherokees seven million acres of western lands and in addition free range westward "as far west as the sovereignty of the United States and their right of soil extend." Difficulties continued, resulting in the Treaty of New Echota in 1835, 7 Stat. 478. By this arrangement the Nation was reunited west of the Mississippi, and settled upon the vast tract of public land acquired by the 1833 treaty. Article I of the New Echota Treaty had this provision:

> "The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, * * *"

Article 16 provided:

> "It is hereby stipulated and agreed by the Cherokees that they shall remove to their new homes within two years from the ratification of this treaty. * * *"

Money from the sales of portions of these Western lands resulted in the creation of trusts for the Cherokee. 117 U. S. 308.

However, when the Cherokees removed West, there remained east of the Mississippi certain members of the Cherokee Nation. They organized themselves as the Eastern Band of Cherokees and brought suit, under congressional authority, against the United States and the Cherokee Nation for a share of the proceeds of certain lands and annuities, derived by the Nation from its Western lands. *Eastern Band of Cherokees* v. *United States and the Cherokee Nation*, 20 C. Cls. 449. While the Cherokee Nation had a constitution which declared,

> "That whenever any of such citizen or citizens shall remove, with their effects, out of the limits of this

> nation, and become citizens of any other government, all their rights and privileges as citizens of this nation shall cease."

page 482, this was understood to be the "common law of all Indian tribes and nations." Page 481. The Court of Claims held, p. 483:

> "If the Indians east of the Mississippi River wish to enjoy the common benefits of the common property of the nation, in whatever form it may be, whether in permanent fund or in the proceeds of the sale of common lands, they must comply with its constitution and laws and become readmitted to citizenship as therein provided."

The Supreme Court upheld this determination, saying:

> "The claim now presented by the Cherokees of North Carolina to a share of the commuted annuity fund of $214,000, and of the fund created by sales of lands west of the Mississippi ceded to the Cherokee Nation, resting, as it does, upon the designation in the treaties of the lands originally possessed by the Cherokees and ceded to the United States, or subsequently acquired by them from the United States, as 'the common property of the nation,' or as held for the 'common use and benefit' of the Cherokee people, has no substantial foundation. If Indians in that State, or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the united Nation, and not in any respect for those who had separated from it and become aliens to their Nation." 117 U. S., at 311-312.

On the other hand, the Supreme Court upheld this court in *United States* v. *Cherokee Nation*, 202 U. S. 101, where the Eastern Cherokees claimed a share in the $5,000,000 paid the Nation under Article I of the New Echota Treaty for the lands east of the Mississippi by virtue of Article 12 giving them "their due portion of all the personal benefits accruing under this treaty for their claims, improvements and *per capita;* as soon as an appropriation is made for this treaty." 7 Stat. 483. This later decision was based on individual rights acquired by the treaty. They had not lost those rights by loss of membership. The Supreme Court, p. 128, approved verbatim the following holding of this court:

> "As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the Nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the Nation, and the Nation properly made no distinction when parting with the Outlet but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the Nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners."

A case similar to that of the *United States* v. *Cherokee Nation*, 202 U. S. 101, just discussed, arose between descendants of the Creek Indians. That nation or tribe

also originally inhabited the eastern part of the United States. By treaties between the United States and the Creek Nation, that Nation's lands east of the Mississippi were ceded to the United States, 7 Stat. 286 and 366, leaving the individual Creeks free to go to the Indian territory with the Nation or to remain in the East. The Creeks who settled by treaty west of the Mississippi formed a new tribal organization. 7 Stat. 417. When later the communal ownership of Indian Territory land seemed inadvisable and allotments were made to individual members of the western Creek Nation, rolls were made of the citizens of the Creek tribe. 27 Stat. 612, 645.[16]

After the establishment of the Indian Claims Commission, the Creek Nation, the political body of the western Creeks, sought redress before the Commission for the acquisition by the United States of eastern Creek lands in the early part of the nineteenth century. The Creek Nation East sought to intervene but the Commission denied that right. On appeal this court reversed that ruling. It was said:

> "The land which is the subject matter of this suit was not land in Oklahoma, nor was it land concerning which the United States dealt exclusively with the Oklahoma Creeks. It was land located east of the Mississippi which was obtained by the United States in 1814 under a treaty with the Creek Nation, all of whose members then lived east of the Mississippi, and whose identity as a tribe and whose ownership of the land ceded had been specifically recognized by the Treaty of August 7, [1790]. If an injury was inflicted by the United States in procuring and enforcing the Treaty of August 9, 1814, it was an injury to the members of the Creek Nation, with whom the treaty was negotiated and who owned the land in question, and not merely an injury to the Creek Indians who (or whose heirs) later emi-

[16] See the Treaty between the United States and the Muscogee or Creek tribe of Indians, 31 Stat. 861.

grated to the Indian Territory west of the Mississippi and formed a new and separate tribal organization for the purpose of holding and managing property awarded to them in the west. * * * The maintenance or lack of maintenance of tribal relations and the occurrence or non-occurrence of acts of recognition of a tribal organization of the Creek Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814." 122 C. Cls. 387, 388.

Another case that indicates the appellants here are not entitled to share in the proceeds of the sale of the Iowa tract of land is *Phinéas Pam-To-Pee* v. *United States*, 148 U. S. 691. This case involved the Potawatomi Indians of Michigan and Indiana. These Indians had remained in the East after the Treaty of Chicago, September 26, 1833, 7 Stat. 431, and the articles supplementary thereto of September 27, 1833, particularly the addition thereto appearing on p. 445. The Indians who had remained in the East under the provisions of the Supplementary Agreement had become scattered and had not received their "just proportion of all annuities" guaranteed them under the final provisions of the supplementary articles appearing in 7 Stat. at 445.[17]

Congress enacted a measure March 19, 1890, 26 Stat. 24, giving jurisdiction to the Court of Claims to "try all questions of difference arising out of treaty stipu-

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[17] 7 Stat. at 445:

"On behalf of the Chiefs and Head men of the United Nation of Indians who signed the treaty to which these articles are supplementary we hereby, in evidence of our concurrence therein, become parties thereto.

"And, as since the signing of the treaty a part of the band residing on the reservations in the Territory of Michigan, have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at, L'arbre, Croche."

lations with the said Pottawatomie Indians of Michigan and Indiana." Without regard to former settlements, it was to review the entire question de novo. Under that authority, two groups of the eastern Potawatomi filed their petition in the Court of Claims; one on April 14, No. 15,095, and the other November 5, 1890, No. 15,103. They sought a settlement of their rights to funds arising under all arrangements and treaties between the Potawatomi and the United States.

Under the earlier petition in the *Pam-To-Pee* case in the Court of Claims [18] no claim was made for any payments under Articles III and VII of the Treaty of June 5 and 17, 1846, 9 Stat. 853.[19] However, a later petition by different parties, U. S. Sup. Ct., Tr. Rec. 16937, contained a claim under the 1833 treaty to their share of the interest in the balance, $643,000.[20]

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[18] U. S. Sup. Ct., Oct. Term 1892, Tr. Rec., vol. 19, p. 16932.

[19] Under that treaty, the balance to be invested would have been the $850,000 promised under Article III less the deductions of $87,000 under Article IV, the $50,000 under Article V, and the $70,000 under Article VI, a total of $207,000, which left for investment $643,000.

[20] "Fifteenth. Under the said treaty of September 26 and 27, 1833, the petitioners claim their share in the land ceded by the United States to the said United Nation of Indians, consisted of 5,000,000 of acres situate in Iowa, and in the avails thereof promised and assured by articles 3 and 7 of the treaty of June 17, 1846, aforesaid (9 St. at L., 855); that the interest at five per cent. on the said trust fund of $643,000 thereby created was $32,150, payable annually, beginning in 1849; that the total amount thereof to and including the year 1890 is $1,350,300, and the value of the same as an annuity at this date is $643,000 making an aggregate sum of $1,993,300 for the interest and the value of the annuity together. The share of that sum belonging to the claimants, estimated on the basis of the numbers of Indians west and east of the Mississippi as aforesaid *per capita*, is $402.68, and the total of the portion thereof belonging to the claimants, all together, is $446,974.80. The amount of said fund belonging to your petitioners separately, estimated on the same basis, is $346,304.80, and this sum they claim nothing having been paid thereon." U. S. Sup. Ct. Tr. Rec., p. 16946, p. 28 of petition.

In their decision, the Court of Claims, *Potawatamie Indians* v. *The United States*, 27 Cl Cls. 403, did not discuss this claim to share in the interest from the balance of the $850,000, i. e., $643,000, arising from the treaty of 1846 concerning the Iowa land. The findings of fact, however, ¶ VIII, shows that the only finding of indebtedness of the government to the Potawatomi Indians on account of the Iowa 1846 treaty, was to allow them to share in the $300 annually, a perpetual payment to be made to the Indians under Article X of that treaty.[21] This they were entitled to because the $300 annual obligation had arisen from the 1828 Michigan Potawatomi agreement granting them the tobacco, iron and steel. 7 Stat. 318. The Court of Claims used "the sum of $1,432,800" as the basis for the calculation. 27 C. Cls. 419. Examination will show that this is the precise figure of the total appearing in the last table on page 407. This last table is the sum of the two preceding tables on the same page. Examination will show that only the $300 perpetual annuity, commuted from the 1828 treaty, Article X, figured in the decision. No computation was made of the $643,000 trust, the land sale or other rights under the 1846 treaty. Furthermore, on appeal it was argued in appellants' brief that this was erroneous:

"The decree below is erroneous in this:

> "4. In not allowing the claimants a proportion of the proceeds of the 5,000,000 acre reservation west of the Mississippi received in exchange for the one on the west shore of Lake Michigan when it was ceded to the United States by the treaty of June 17, 1846." *Pam-To-Pee* v. *United States*, brief for Appellants filed Jan. 3, 1893, U. S. Sup. Ct., p. 10.

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[21] "Article X. It is agreed that hereafter there shall be paid to the Pottowautomie nation, annually, the sum of three hundred dollars, in lieu of the two thousand pounds of tobacco, fifteen hundred pounds of iron, and three hundred and fifty pounds of steel, stipulated to be paid to the Pottowautomies under the third article of the treaty of September 20, 1828." 9 Stat. at 855.

(File copies of Briefs, U. S. Sup. Ct., 1892 Term, vol. 16, appellants' brief, p. 10.)

In ¶ 5 the argument was made that the $643,000 above referred to and remaining with the United States in trust for said Indians should be taken into consideration. The appellants in that case pointed out, brief, p. 29, as a recognition by the Congress of their right to share in the western assets, the fact that the sum of $39,000, appropriated by Congress before the suit was brought in the Court of Claims, was paid out of funds of the United States held in trust for the Western Potawatomi Indians.

The Government replied, U. S. brief, p. 14:

> "The Indian title was only one of occupancy. The Pottawatomies who went west of the Great River became possessed of that right of occupancy which civilized nations concede to belong to Indian tribes living upon specified lands. Those Indians who by agreement were to remain east, and those who refused to obey and who evaded the efforts of the Government to locate them west, never had any occupancy, or any possession of any kind, and never had anything that can be recognized as an Indian title or right of use, or of occupancy, and had nothing in this connection to sell, and never became possessed of anything whatever, on account of the Western reservation for which they are entitled to payment."

On the appeal in *Pami-To-Pee* v. *United States*, 148 U. S. 691, 695, the Supreme Court noted the trust of $643,000 remaining from the $850,000. However, it did not allow the eastern Potawatomies anything under their contention but instead accepted the conclusion of the Court of Claims that omitted any payment by virtue of the trust fund created in 1846. Page 703.

Such a conclusion as was reached in the *Cherokee Trust Funds* case, supra, we think, is compelled by the char-

acteristics of Indian tribal life. Residence on a reservation may not be essential but membership is. *Halbert v. United States*, 283 U. S. 753, 762. Death terminates the incidents of tribal membership. Children take in their own right as members.[22] Nothing appears to indicate any change by the Potawatomi of the normal membership requirement of residence with the Nation. In 1861, 12 Stat. 1191, a treaty with the Potawatomi was concluded concerning the Kansas land, received through the Council Bluffs treaty. It provided for allotment of lands in severalty "with power of alienation" to those desiring such power and deemed competent. The balance was to be held in common. Article IV. In 1867, 15 Stat. 531, another treaty provided in Article IV for the removal of those whose desire to do so to Indian Territory on a tract to be there acquired. In that treaty arrangements were made to keep certain lands in common, excepting the Prairie Band, i. e., those remaining in Kansas, from any interest therein.[23] In neither treaty was any provision made or any consideration given to the non-emigrant Potawatomi of the 1833 treaties. Since

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[22] LaRoque v. United States, 239 U. S. 62, 66. Cf. Cherokee Intermarriage Cases, 203 U. S. 76, 86:

"By section 2 of article 1 of the constitution of 1839 it was provided that 'whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *provided, nevertheless,* that the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission.'" 4 Indian Claims Commn., Pt. 2, at 532.

[23] 15 Stat. at 535:

". . . which amount shall be the common property of the tribe, except the Prairie band, who shall have no interest in said reservation, to be purchased as aforesaid, but in lieu thereof shall receive their pro rata share of the proceeds of the sale of said land in money, as the same may be received: * * *"

these treaties were negotiated by the chiefs and headmen of the United Potawatomi Nation, it seems conclusive that the Nation, who in the absence of congressional action, has the power to determine membership, denied membership to the non-emigrant Potawatomi.

Our review of this record leads to the conclusion reached by the Commission. We think the Commission's findings of fact, material to the conclusions reached by us as to the claims of appellant, are supported by substantial evidence in the record as a whole in accordance with this court's interpretation of the Indian Claims Commission Act in *The Osage Nation of Indiana* v. *The United States*, 119 C. Cls. 592, 602, and support the Commission's final conclusion that the appellants had dissolved "their connections and their rights to share" in the proceeds of the Western lands before the Treaty of Council Bluffs and Osage River.

The judgment of the Indian Claims Commission dismissing the petition for intervention is affirmed.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The case of Prairie Band of Pottawatomie Indians, Docket No. 15-J, and that of Citizens Band of Potawatomi Indians, Docket No. 71-A, were consolidated for trial. It is not denied that these two bands of Potawatomi are successors in interest to the Potawatomi Nation. In those two cases the bands each seek recovery of additional compensation for two tracts of land, one composed of 5,000,000 acres, located in western Iowa, and the other, consisting of 909,565 acres, located on the Osage River in Kansas.

The Iowa tract was granted by defendant to the "United Nation of Chippewa, Ottowa and Potawatomie Indi-

ans" by the treaty of September 26, 1833, 7 Stat. 431, and the Osage River tract was acquired by a grant of the Government to the "Potawatomies of Indiana," contained in the treaty of February 11, 1837, 7 Stat. 532. Both tracts were ceded to defendant by the treaty of June 5 and 17, 1846, 9 Stat. 853, and it is the consideration the defendant paid for that cession that is the basis for the claims here under consideration. There is no dispute about this. The dispute arises as to which Potawatomi Indians shall share in the award, that is, whether it shall be only for those Potawatomi who are descendants of the Indians who moved west of the Mississippi River to lands provided for them by defendant in the treaties of 1833 and 1837, or whether those descendants of Potawatomi who remained east of that river should share the award with those who moved west.

During the hearings on the two claims mentioned above, a petition of intervention was, with the consent of the Commission, filed purporting to represent all Potawatomi related by blood whose ancestors did not move west of the Mississippi River to lands provided for Potawatomi by the treaties of 1833 and 1837, but remained in Wisconsin and Michigan and have since remained there. Their contention is that the treaties of 1833 and 1837 were made for the benefit of all Potawatomi wheresoever situate; that there was but one nation or tribe, and all treaties made with any segment or group of such Indians were in reality treaties of an entire nation and, therefore, even though the ancestors of the intervenors did not remove west of the river, they are entitled to share with petitioners the award in this case.

The petitioners in Dockets 15-J and 71-A moved to dismiss the intervening petition and thus raised the question whether the intervenors have any interest in the claims set forth in said dockets. Since such claims are substantially alike we shall treat them as one for

the purposes of said motion, and generally refer to the claimants in both dockets as petitioners.

The intervenors' petition is by an organized group living on a reservation in Wisconsin, another organized group living on a reservation in Michigan, and six individual Potawatomi Indians. We shall accept, for the purposes of this motion, the intervenors' assertion that they represent all Potawatomi Indians who did not move west of the Mississippi River to the Iowa and Osage rivers tracts provided for Potawatomi Indians by the two treaties referred to above, also such Potawatomi Indians who at one time or another moved west of the Mississippi but later returned to places east of that river and remained east.

The evidence is plain that the United Nation of Chippewa, Ottawa and Potawatomi and most of its members, and the Kankakee band of southern Illinois moved to Iowa on lands provided by the 1833 treaty. Later, the Wabash and St. Joseph bands, and most of their members, moved to the Osage River tract acquired by the 1837 treaty. Finding 25.

The position of the intervenors is best set out by quoting from their brief:

> * * * (a) that there was one, and only *one tribe,* the Potawatomi Nation or United Nation of Chippewa, Ottawa and Potawatomi, inclusive of all Potawatomies; (b) that the ancestors of petitioners and intervenors were members of that Nation; (c) that intimate and blood relationship existed between them and now between petitioners and intervenors; (d) that the Nation owned all the land; (e) that there were and are no autonomous groups in the Nation; (f) that the lands ceded by the Treaty of June 5-17, 1846 belonged to the United Nation; (g) that every Potawatomi Indian, removed or not removed, organized or not organized, who is or can be identified as a descendant of those of the tribe as it ex-

> isted when it owned the lands east of the Mississippi river and acquired title to the lands in Iowa and Kansas, are entitled to participate with all other identifiable Potawatomi Indians * * *.

The petitioners, on the other hand, while admitting that there was an ethnic group known as the Potawatomi Nation, insist that the nation was actually composed of two general groups: Those in northern Wisconsin and northern Michigan, referred to as Forest Potawatomi, and a part which had separated from those in the north and migrated south and eventually settled around the southern part of Lake Michigan in the states of Michigan, Indiana and Illinois. And that prior to 1833, the southern Potawatomi became divided into four main bands or groups which, in its dealings with the United States acted independently of each other and of the northern group, and also of the Illinois-Wisconsin group.

The main contention of the intervenors, as set forth in the quoted part of their brief and in their proposed Finding II, is, as has been stated, that there was only one nation or tribe which included all Potawatomi, and that it was never divided into independent political groups. They seek to explain the many treaties executed by Potawatomi Indian groups up to and including the treaty of June 5-17, 1846, 9 Stat. 853, by asserting that certain groups performed some local or group activities and that in dealing with them the government agents created a name for them by describing their geographical location, but however described, the lands involved belonged to all Potawatomi and not to any autonomous group of such Indians. Hence, they contend, the Indians who did not follow the main groups to Iowa after 1833 or to the Osage River in Kansas after 1837, but remained east of the Mississippi River in Wisconsin and Michigan, are entitled to the same rights in the lands under the treaties of 1833, 1837 and 1846, as those who moved west of the Mississippi to the locations provided by the treaties of 1833 and 1837.

In the treaty of Greenville, Ohio, of August 3, 1795, 7 Stat. 49, are identified two bands of Potawatomi. This treaty was executed by fifteen tribes, including Potawatomi (Pottawatimas). In the caption of the treaty reference is made to the tribe of Indians called the "Putawatimes," but it was executed by "Pottawatimas of the river St. Joseph" and "Pottawatimas of Huron," two groups widely separated geographically. It is no doubt true, as the intervenors contend, that they were given the names of the rivers upon which they resided. This was a common practice of treaty-makers, but it is also true that such a designation was one the Indians would likely understand and served to identify separate parts of an ethnic group. We believe there were two separate Potawatomi groups who acted independently of each other and other Potawatomi in executing the Greenville treaty.

The treaty of July 4, 1805, 7 Stat. 87, and the treaty of November 17, 1807, 7 Stat. 105, were made with several Indian groups, including Potawatomi. In the captions of those treaties the Potawatomi are referred to as a nation; but such general designation is restricted in each by provisions of the respective treaties. In the body of the 1805 treaty (Art. V), provision is made for certain payments to "such of the Pottawatima nation as reside on the river Huron of Lake Erie, and in the neighborhood thereof." In the 1807 treaty, the sum of $1666.66 was made payable to the "Pottawatomie nation" and an annuity of $400 "to such of the Pottawatomies, as now reside on the river Huron of Lake Erie, the river Raisin, and in the vicinity of said rivers. Thus, it is apparent, that the dealings were not by the Potawatomi Nation, that is, all people of the Potawatomi blood, as the intervenors—because of the designation, Potawatomi Nation, appearing in the captions of the treaties—contend, but only with that small group which occupied a relatively small area on and in the vicinity

of the Huron River. General designations of parties, as contained in the caption of a treaty, must of necessity give way to specific references to them in the body of a treaty, and when the documents are so worded as to plainly show the real parties bound by and entitled to share in the benefits of such agreements, such references must prevail over a broader or inaccurate designation appearing in the caption. We belive that it was understood by the parties to the 1805 and 1807 treaties that only the Huron band was intended as the Potawatomi parties thereto. Moreover, there is nothing in either treaty or the evidence indicating the purpose or authority to negotiate with the Government for Potawatomi other than the Huron band separately. Furthermore, it will be noted that in the 1807 treaty there were reserved, as numbered in Royce Michigan 3, Segensiwin's village (135), Tonquish's village (136), and the Macon village (137) tracts for the Huron. In all a mere thirteen square miles were reserved for this group, which fact is in itself proof that in joining in the treaty and in retaining the reserves it was acting independently of other Potawatomi. Further evidence of this political independence of the Huron is found in the treaty of September 19, 1827, 7 Stat. 305, by which the Government consolidated some of the "dispersed bands of the Potawatomi Tribe in the Territory of Michigan." In this treaty the three Huron reserves mentioned above were ceded to defendant and it is presumed that some Huron went to the Notawaseppe area (Royce Mich. 3, Tr. 189), which by said treaty was enlarged and reserved for all of the dispersed bands of Potawatomie in the Territory of Michigan.

The intervenors stress the importance of the treaty of September 19, 1827, 7 Stat. 305, as evidencing action by the entire Potawatomi people, as opposed to band action, because the caption recites that it is a treaty with the "Potawatomie Tribe of Indians" and that its

purpose was to "consolidate some of the dispersed bands of the Potawatomie Tribe in the Territory of Michigan * * *." To carry out this stated purpose there was ceded certain specified tracts "heretofore reserved for the use of said Tribe."

Reference to the treaty of 1827 shows beyond question that the parties thereto were dealing with reserves theretofore set aside to specified bands of Potawatomi, namely, the three small reserves mentioned above, to the Huron, and several other small tracts which had been set aside to other Potawatomi bands by the treaty of August 29, 1821, 7 Stat. 218. At the time of the 1827 treaty, there were several thousand Potawatomi, other than the bands ceding the reserves in 1827, residing in southern Michigan, northern Indiana and in Illinois and southern Wisconsin, yet the various bands acted as politically independent entities in ceding their respective reserves in 1827, reserves which were set aside to the respective groups from larger areas previously ceded. It would have been somewhat of a surprise to these reservees, we imagine, and the treaty Commissioners informed them that their reserves belonged to other Potawatomi as well as themselves. So it must be accepted as a fact that, while the Huron and the other Potawatomi groups acted under a treaty which, in its caption, purports to have been made by the "Potawatomie Tribe," it was in reality a treaty with the individual groups who acquired the individual reserves. The Huron, as has been seen, beginning in 1795 and until the 1827 treaty, made four treaties dealing with the lands in each of which they acted as an independent political unit. There is no evidence that they, as a political unit, made or joined in any land cessions after 1827, but their political independence was demonstrated thereafter. The Huron asserted an exclusive interest in the treaty of July 4, 1805, which was recognized by defendant and that band relinquished any interest it might have had in the perma-

nent annuity of the 1795 treaty. (Find. 32). It commuted the $400 permanent annuity of the 1807 treaty and received the commutated sum of $8000 by the Act of June 29, 1888, 25 Stat. 225. (Find. 33). And by the Act of March 4, 1889, 25 Stat. 988, there was appropriated and paid the Huron $9400 found to be due them under the 1805 and 1807 treaties. In this act they are referred to as the "Pottawatomies of Huron, Michigan." (Find. 34). The Huron apparently were then on lands purchased for them by the people of Michigan in 1846. Int. Ex. I-106. After the treaty of 1846, the annuities payable to the bands united by that treaty were paid to the Potawatomi Nation, except those payable to the Huron (Find. 28) under treaties made with that band exclusively.

The Huron did not join in the 1833 or 1837 treaties nor does the evidence show that they moved to the Iowa or Osage river tracts, but appear to have remained in Michigan. The political actions of the Huron, as outlined above, show that they never acted for or on behalf of Potawatomi in general, but as a completely autonomous entity.

Following these treaties with the Huron—who were probably the most easterly of the Potawatomi groups—were treaties with other Potawatomi groups involving lands generally west of the Huron, in Illinois, Michigan, and Indiana.

On October 20, 1832, 7 Stat. 378, the "Potawatomi Tribe of Indians of the Prairie and Kankakee" ceded lands south of Lake Michigan in Illinois on the Kankakee river (Royce, Ill. 1, Tr. 177).

On October 26, 1832, 7 Stat. 394, the "Chiefs, Headmen and Warriors of the Pottawatomie Indians" ceded land in northwest Indiana lying immediately east of the Kankakee tract. This group is identified by the Act of March 2, 1833, 4 Stat. 636, 638, as the "Pottawatomies of

the Wabash" in which appropriations provided for in Article III, were made to cover the first annuity of $20,000 and goods to the value of $100,000.

A treaty dated October 27, 1832, 7 Stat. 399, was concluded with the "Potawatomies of the State of Indiana and Michigan Territory" ceding lands in north central Indiana. Topenebee signed this treaty and is described therein as "principal chief."

Hence, by the treaties of 1795, 1805, 1807, and the three treaties of 1832, referred to above, four Potawatomie groups—the Huron, Kankakee, St. Joseph and Wabash—dealt with the Government as independent and distinct groups and ceded separate tracts. During this period, at least from before 1816 to 1833, a large part of the Potawatomi lived along the west shore of Lake Michigan and in areas west thereof, as shown by Royce tracts 77, 78, 147, 149, and 187, Illinois 2 and Wisconsin 1, Maps 18 and 64, respectively. Geographically, Potawatomi group holdings extended from western Lake Erie to the Mississippi River from west and southwest of Lake Michigan, those west and southwest of Lake Michigan having been separately dealt with by the Government as that band of Potawatomi known, from the first cession in 1816 to the final cession in 1833, as the United Tribes or Nations of Chippewa, Ottawa and Potawatomie Indians. With the exception of the Prairie and Kankakee cession of October 20, 1832, 7 Stat. 315, the Government had dealt with, and such United Nation had ceded in separate tracts all Potawatomi lands remaining in Illinois and Wisconsin at the time of the 1833 cessions. No other Potawatomie group, whether in Michigan or Indiana, were parties to those treaties, nor was the United Nation a party to any treaty made by the Huron, St. Joseph or Indiana Potawatomi. These main treaties by the various groups, some ten in number, are listed following Finding 11.

In addition to the above, there were thirteen treaties, which are cited under Finding 23, by which individual bands of Potawatomi ceded to the United States small tracts reserved for their individual use from cessions of large areas previously made. In each of these treaties, the consideration was made payable to the "chief and his band," except in the 1836 treaty, 7 Stat. 515, the consideration is made payable to the "chiefs, warriors and headmen of the Potawattimie nation," but the treaty was, according to its caption and text, with the "chiefs, warriors and headmen of the Potawattamies of the Wabash." In none of these thirteen treaties does it even remotely appear that Potawatomi, other than the individual bands, had any interest in the ceded tracts.

The above transactions with Potawatomi Indians show beyond doubt that the Potawatomi people, at the time of the treaty of 1833 and the treaty of 1837, was composed of numerous autonomous groups who in their land dealings with defendant acted independently of each other and as autonomous entities.

IDENTITY OF INTERVENORS

What has been said above deals mainly with the rights of non-emigrating Potawatomi as members of an alleged over-all nation. It now becomes necessary to identify the intervenors in order to determine whether their ancestors retained any rights as members of the bands which acquired the Iowa and Kansas lands under the treaties of 1833 and 1837, since they seek to trace their rights through such ancestors.

In their petition the intervenors allege that "they are descendants and successors in interest of the Potawatomi Indians who, and the Potawatomi Indian Nation that owned and lived upon the lands hereinafter described and who, subsequent to Treaty of September 26, 1833,

(7 Stat. 431) were not moved west of the Mississippi river or, who, pursuant to the Treaty of September 27, 1833 (7 Stat. 442) remained east of the Mississippi river, or who returned from west of the Mississippi to live east of said river." This general allegation is repeated in substance in their proposed finding I.

But in their proposed finding XVI, the intervenors give us a more detailed description of their asserted tribal connections. Therein they state that they are composed of three groups of Potawatomi Indians: (1) Those descendants of Potawatomi who resided on lands in Wisconsin which were ceded by the treaty of September 26-27, 1833 and who thereafter remained in Wisconsin or returned there after going to Iowa pursuant to that treaty, and include ancestors of members of the Hannahville Indian Community of Wilson, Michigan, and the Forest County Potawatomi of Crandon, Wisconsin; (2) Those descendants of Potawatomi Indians who lived upon Potawatomi lands in the State of Indiana and the Territory of Michigan prior to and in 1833, and (apparently) are descendants of members of the group identified in the supplemental treaty of September 27, 1833, 7 Stat. 442, as the "United Nation of Chippewa, Ottawa and Potawatomie," but who did not move west of the Mississippi River but remained in Michigan. Included in this group is the Pokagon band; (3) Those descendants of Potawatomi Indians who lived on and in the vicinity of the Huron River of Lake Erie on three reservations which were ceded by the treaty of September 19, 1827, 7 Stat. 305. These Indians became known as the Potawatomi of the Huron and, presumably, moved to or near the Nottawasepe Reservation in Michigan, which by the 1827 treaty had been enlarged to accommodate "dispersed bands of the Potawatomie Tribe in the territory of Michigan."

Huron Band

We have discussed the Potawatomi of the Huron at some length above. They were a relatively small group, for in 1845 there were only 30 or 40 in Michigan and some in Canada (Def. Ex. 29). In 1850, there were only 51 members of that band. The Huron made no treaties after 1827 and were opposed to moving and in 1850 were living upon lands of their own in Michigan. There is no evidence that they as a band moved west of the Mississippi to either tract provided for Potawatomi. They always acted as an independent group and there is no evidence that they took part in the treaties of 1833 and 1837, or that they acquired any rights in either tract. The petitioners and defendant are agreed on this. So, the Huron band may be excluded as claimant.

Pokagon Band

The Pokagon (Pocagon) band's identity is recognized by all parties to the motion as being a part of the St. Joseph band and at the time of the supplementary treaty of September 27, 1833, 7 Stat. 442, to which they were a party, lived on a reservation near Niles, Michigan. After the execution of this treaty, Pokagon's band refused to emigrate west to the Iowa tract and asked permission to remove to northern Michigan. This permission was granted by the supplement to the treaty of September 27, 1833, and they moved north—some 250 of them—but later returned to a tract acquired by them near their former reservation in the vicinity of Niles, Michigan. (Ex. I-66). By its action, as disclosed by the plain terms of the supplement to the September 27, 1833 treaty, the Pokagon severed its connection with the United Nation and voluntarily abandoned their rights in the Iowa land, retaining, however, their proportionate share of the annuities in all Potawatomi treaties prior to September 26, 1833. Their share of such annuities

was eventually paid them. Findings 40-48 and evidence cited.

In a suit brought in the Court of Claims by the Pokagon band for their proportion of annuities under the supplement to the September 27, 1833 treaty, an award was made for this band. 27 C. Cls. 403, 412. In its opinion said court said concerning the effect of the supplement to the treaty of September 27, 1833:

> * * * Under the terms of this supplement a portion severed its connection with the united nation, and thereby lost its identity with the Pottawatomies as a tribe, in order that it might avail itself of the privilege of remaining in the Territory of Michigan. In ceasing to be a part of the united nation, it did not retain any part of the political or corporate power of the tribe, that was undivided and still inherent in the body which emigrated beyond the Mississippi pursuant to the terms and requirements of the treaty. The portion remaining may have acquired a right to share in the annuities, but the corporate power of the tribe remained intact and incident to the larger body which emigrated.

It follows from the above, that the Pokagon band never acquired any interest in the lands ceded by the Potawatomi Nation in 1846, and the descendants of the members of that band who may be included as intervenors herein are not entitled to share in any award that may be made in the above-entitled cause.

Wisconsin Indians

In considering that part of the intervenors referred to in the group (1) classification above as Wisconsin Indians, we do not include the Pokagon band or the Huron, as those groups are separately considered above.

The intervenors subdivide the Wisconsin Indians into two divisions (proposed findings XVI and XVII): (a) Those descendants of Potawatomi who migrated to the

Iowa tract and later returned to Wisconsin; and (b) those whose ancestors remained in Wisconsin or Michigan and never migrated west of the Mississippi.

As to the descendants of those Potawatomi referred to in the intervenors' proposed findings I, XVI-XVIII, who, having moved west of the Mississippi River or to Canada, returned east of that river to live, we are unable to identify them. There is evidence in the record to the effect that some Potawatomi who emigrated to Iowa or Kansas pursuant to the treaties of 1833 and 1837 returned to live east of the Mississippi River. This is indicated by some of the exhibits, but there is no satisfactory evidence showing when or from where they came or that they are included as part of the intervening petitioners. If there exists such an identifiable group the burden would be upon them to show who they are and how they are represented in these proceedings. As the evidence shows, the two organized communities and five of the six individual intervenors represent non-emigrating Potawatomi. The sixth individual intervenor did not testify, nor is it shown that he represents the returning Indians. We do not overlook the testimony of the individual intervenor, Michael B. Williams, who testified: "I represent the citizens composing the body of the Pokagon group and other Potawatomi who are similarly situated to our own selves." Even if the witness intended by this statement to include returning Potawatomi from the west, which we doubt, it is too vague to base a conclusion that he represents returning Indians. Accordingly, on the evidence, or lack of evidence, we must hold that the intervenors have not shown that they or any of them have identified any group or class of Potawatomi whose ancestors migrated west and afterward returned east of the Mississippi, or that such a class is represented in this proceeding. Incidentally, notwithstanding the reference to Canadian Potawatomi in proposed Finding I, the intervenors state

in their brief (p. 5) that the Canadian Indians are not parties to this cause.

Coming now to the second division of Wisconsin Indians, we believe the evidence is plain that the intervenors comprise descendants of non-emigrating Potawatomi, that is, those Potawatomi who remained in Wisconsin or Michigan and did not move to Iowa, as provided by the 1833 treaty or to Kansas, as provided by the 1837 treaty.

By the treaty of September 26, 1833, 7 Stat. 431, the United Nation of Chippewa, Ottawa and Potawatomie Indians ceded their remaining lands in Illinois and Wisconsin (Royce 187) and were ceded 5,000,000 acres of land in western Iowa. Article 2 required the Indians to vacate the Illinois part of the cession immediately upon ratification, which was February 21, 1835, and the Wisconsin part within three years after ratification of the treaty, or by February 21, 1838. The United Nation moved to Iowa, except some remnants who refused to move and avoided the Government's efforts to remove them. In the early reports, these Indians were referred to as stray bands, some at least had committed depredations upon the whites in Wisconsin.

In the Act of June 25, 1864, 13 Stat. 161, 172, the Secretary of the Interior was authorized to take charge of such stray bands and to withhold the proportion of the annuities the stray bands would be entitled to if they were settled on the reservations of their tribe. (Find. 51). Nothing was accomplished under this act because, as stated by the Secretary (I-Ex. 85 and Def. Ex. 41), no census of the Wisconsin band had been taken annually.

By the Act of June 21, 1906, 34 Stat. 380, the Secretary was directed to cause an enrollment of the Potawatomi Indians of Wisconsin (the stray bands) to be

made. This was done by one W. M. Wooster who, by his reports of December 18, 1907 and January 18, 1908 (Def. Ex. 41, pp. 12 and 22) enrolled 2007 Wisconsin Potawatomi, of which 457 were in the United States and 1550 in Canada.

The importance of this roll lies in the fact that only non-emigrant Wisconsin Potawatomi were enrolled. He also excluded Pokagon's band. (Find. 56). The evidence is quite convincing that the intervenors must be considered as the non-emigrant Wisconsin Potawatomi Indians.

Having decided that there was no over-all Potawatomi Nation but that there were several autonomous Potawatomi groups, we reach the question whether the Wisconsin Potawatomi because of their former relationship to the United Nation lost their rights as descendants of members thereof because their ancestors failed to remove west of the Mississippi pursuant to the 1833 and 1837 treaties.

It is not questioned but that the alleged rights of the intervenors in the 1846 cession by the Potawatomi Nation stem from the 1833 or 1837 treaties if their ancestors were members of the groups acquiring the two western tracts. Since the intervenors assert that they were, we will proceed on that assumption.

The treaty of September 26, 1833, 7 Stat. 431, granted the land in western Iowa to the United Nation of Chippewa, Ottawa and Potawatomi Indians "to be held as other Indian lands are held which have lately been assigned to emigrating Indians * * *." And the Potawatomi of Michigan, south of the Grand River, by the supplementary treaty of September 27, 1833, 7 Stat. 442, became a party to the September 26, 1833 treaty, and thereby became interested with the United Nation in the Iowa grant. The treaty of February 11, 1837,

granted lands to the Potawatomies of Indiana—the Osage River tract. In all of these treaties the grants were to political entities. Of course, the members thereof shared a common benefit but, as has been repeatedly held by the Court of Claims and the Supreme Court, they, the members, acquired no vested interest in the tribal lands and in none of the treaties here involved was there conveyed title to the individual members. Sizemore v. Brady, 235 U. S. 441, Eastern Cherokee v. U. S. 117 U. S. 288, Cherokee v. Hitchcock, 187 U. S. 294, Halbert v. U. S., 283 U. S. 753. And, as these cases show, voluntary severance of tribal membership terminates the rights of individual Indians to share in the tribal assets where, as here, no provision is made for them in a treaty.

The intervenors seek to overcome these plain doctrines by contending that in neither of the treaties of 1833 or 1837 were their ancestors required to move west in order to share with those who did have the rights of tribal membership.

By Article 2 of the 1833 treaty, it is stated that it is the wish of the United States that the United Nation of Chippewa, Ottawa and Potawatomi Indians move to the Iowa tract as soon as convenient. To expedite the removal, the Government agreed to pay the expenses of the removal and provide subsistence during and for a year after the removal.

The last sentence of said Article 2 required the Indians to vacate the Illinois part of the cession immediately upon ratification of the treaty (Feb. 21, 1835), but were "permitted to retain possession of the country north of the boundary line of said state (Illinois) for a term of three years" thereafter. And by Article 4 it is provided that the annuity money payable under former and the 1833 treaties shall be paid as follows: A just proportion to the portion of the nation moving west during

the ensuing three years and after that period all annuities were to be paid west of the Mississippi, that is, in Iowa. The clear purpose of these provisions was that the entire nation move west, and most of their members with their chiefs and headmen did so. Some remained east in Wisconsin or Michigan, while others moved to Canada to avoid compulsory removal to Iowa. It is impossible to read the above provisions of the 1833 treaty and September 27, 1833 supplement thereto in connection with the journal of the treaty proceedings of September, 1833 (Pet. Ex. 14) without reaching the conclusion that it was intended by those treaties that all members of the United Nation, which included the Illinois and Wisconsin Potawatomi, Chippewa and Ottawa, and the Michigan Potawatomi south of the Grand River, 7 Stat. 442, were to move west of the Mississippi. This intent is further borne out by the fact that only those who were allowed to remain in the east did so by special permission of the parties to the treaty of September 27, 1833—the Pokagon band. (Supp. to treaty of September 27, 1833, 7 Stat. 442).

The treaty of February 11, 1837, 7 Stat. 532, is more specific as to group removal, for in Article 1 thereof the chiefs executing the treaty for themselves and their bands expressly "agree to remove to a country that may be provided for them * * southwest of the Missouri river * *." The country referred to was of course the Osage River tract, later specifically located and occupied.

In none of these treaties is provision made for non-emigrating Indians, and the evidence shows that those Indians who did not remove with their respective groups did so voluntarily, in fact, many, if not all, resisted compulsory removal from their former habitats. By this action they effectively severed their connection with the United Nation and thereby lost their identity as individual members of their respective bands. The Pota-

watomi case, 27 C. Cls. 403, from which we have previously quoted, is authority for this statement. While in that case the withdrawal of the Pokagon band was with permission of the United Nation, the basis for the decision was the effect of its severance. It would seem the decision would have been the same had the Pokagon band simply remained in Michigan, as their voluntary severance would have deprived them of the rights as members of the United Nation in the lands of that nation. Had they not been given a proportionate part of the annuities they perhaps would have lost those also. But however that may be, the case, Eastern Band of Cherokee v. United States, 117 U. S. 309, seems to apply to the non-emigrating Indians. In that case, concerning Cherokee who refused to move from North Carolina with the nation when it moved west of the Mississippi, the Supreme Court, at p. 887, said:

> If Indians . . . wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the court of claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds and that property were dedicated by the Constitution of the Cherokees, and were intended by the Treaties with the United States for the benefit of the united Nation, and not in any respect to those who had separated from it and become aliens to their Nation.

The intervenors and the Government contend that the case, McGhee v. United States, 122 C. Cls. 380, is determinative in the principle announced of the rights of intervenors here. In that case the Creek lands involved were lands located in southeastern United States, which had been ceded by the Creek Nation in 1814. Some years after that treaty the Creek Nation moved west and acquired

lands in Oklahoma, but as a tribe it sued for the value of the *eastern* lands. In the suit before us the Nation claimed it was the exclusive owner of the claim in question and denied the rights of the intervenors therein, who had remained east pursuant to the treaty of March 24, 1832, 7 Stat. 366. The Court of Claims held that those non-emigrating Creeks, being descendants of members of the nation as it existed in 1814, had an interest in the eastern lands along with the Creeks who moved west and since their rights were denied by the petitioners in that case they were entitled to assert them as intervenors.

The difference between the McGhee case and this case is obvious. In this case the claim involves lands acquired by certain groups of Potawatomi in consideration of their relinquishment of title to certain lands they held east of the Mississippi River. The McGhee case is unlike this case in that there the claim involved the lands the Creeks in southeastern United States had relinquished, and not the lands the Creek Nation subsequently acquired in Oklahoma. This difference is indicated by this language taken from the opinion in the McGhee case, 122 C. Cls. 380, 387:

> . . . The land which is the subject matter of this suit was not land in Oklahoma, nor was it land concerning which the United States dealt exclusively with the Oklahoma Creeks. It was land located east of the Mississippi which was obtained by the United States in 1814 under a treaty with the Creek Nation, all of whose members then lived east of the Mississippi, . . .

The Government also contends that by the Acts of June 25, 1964, 13 Stat. 172, June 21, 1906, 34 Stat. 380, and the appropriations aggregating $447,339 made pursuant to the report of the Secretary of the Interior (Def. Ex. 21; Int. Ex. I-85), the Congress recognized the rights of the intervenors to share with petitioners in the recovery herein.

We have referred to the 1864 Act (For text see Find. 51) above. Instead of a recognition of intervenors' (Wisconsin Indians) rights to share in the award herein, it would appear that an attempt was made by that act to deprive the Potawatomi Nation of funds vested in that nation by treaties,—questionable action to say the least, and apparently so considered by the Secretary of the Interior in his report of April 1, 1908 (Def. Ex. 41, p. 7). In any event, as stated above, no Potawatomi funds were withheld under it and it was in effect superseded by the Act of June 21, 1906, 34 Stat. 380.

The Act of June 21, 1906, does not, as we read it, purport to give the Wisconsin Potawatomi any rights in Potawatomi annuities, trust funds or other moneys, as members of the nation, but only required "an investigation to be made of the claims of the Potawatomie Indians of Wisconsin * * and to report thereon * *" by the Secretary of the Interior. He was not directed to make any determination of rights of Wisconsin Potawatomi whose ancestors did not emigrate with the groups to which they had belonged, and he did not do so. He did, as directed, cause an enrollment of the non-emigrant Potawatomi and determined that there were 2007 non-emigrant Potawatomi, of which 457 resided in Wisconsin and Michigan, and 1550 resided in the Dominion of Canada. He also determined that the proportionate share of all non-emigrant Indians was $1,964,565.87 if they were entitled to share in the annuities of the Potawatomi Nation as created by the 1846 treaty.

Over five years after the Secretary's report of April 1, 1908 (Def. Ex. 41), the Congress, on June 30, 1913, 38 Stat. 102, passed an act which determined that the sum of $447,339 was the proportionate share of the Wisconsin band residing in Wisconsin and Michigan, in annuities and moneys of the Potawatomi Tribe in which they had not shared. In this act and by the acts of May 28, 1916,

39 Stat. 156, March 2, 1917, 38 Stat. 991, May 25, 1918, 40 Stat. 589, June 30, 1919, 41 Stat. 29, and May 29, 1928, 45 Stat. 901, appropriations aggregating $447,339 were made for the purchase of land, buildings, farm implements, supplies, etc. and to pay for legal services, for the Wisconsin band. In none of these acts was the appropriation made a charge against past, existing, or future Potawatomi funds, and in each, except the last, the appropriation was based upon the report of the Secretary of the Interior of April 1, 1908 (Def. Ex. 41) in which, as we have before stated, the Secretary made no determination of rights of the Wisconsin Indians as members of the Potawatomi Nation although the total of the appropriations was based upon the amounts he found would be payable had the Wisconsin-Michigan Potawatomi retained their membership in the groups or bands who moved west. In essence, the Congressional action was a final disposition of the troublesome problem resulting from the presence of those non-emigrating Indians in the east rather than a recognition of their rights as former members of the migrating bands. That Congress had the power to make such gratuitous appropriations cannot be disputed, but in doing so, it acted, we believe, solely in the interest of the United States and to provide a home for those Potawatomi who voluntarily severed their connections with the migrative bands.

So now, after the lapse of years, to permit the intervenors to share in the award in this case would, in our opinion, work a grave injustice on the petitioners who have shown themselves to be the sole beneficiaries of the award to be made on their claim. Nor do the equities of the case require the inclusion of the intervenors as beneficiaries of the award herein. The treaties of 1833 and 1837 were made with the several Potawatomi groups and in each there was ceded the common property of such groups and the interest of each member thereof, so the intervenors by basing their claims upon, or growing out

of such treaties, of necessity admit the effect thereof on their rights as members of the bands making the cessions but, as was held in the Eastern Cherokee case, supra, and the Court of Claims in the same case, 20 C. Cls. 449, when such members refuse to join their bands and remain permanently separated from them they thereby dissolve their connections and their rights to share in the band property or the proceeds from the sale thereof. It is perhaps true that ancestors of intervenors were members of the bands making the cessions in 1833 and 1837, but that fact, if it is a fact, does not help the intervenors in this case because, as we have stated, such ancestors acquired no interest in the western land. If the intervenors have claims they would appear to arise from the cessions of lands by bands in which their ancestors were members in 1833 or 1837—lands east of the Mississippi River, and not the western lands ceded by the Potawatomi Nation in 1846. However, we are not to be understood as deciding here that the intervenors have any such rights as that question will perhaps arise in other cases pending before the Commission, involving some or all of the eastern lands ceded in 1833 and 1837.

We, accordingly, conclude that the petitioners' motion should be sustained and the intervenors' petition dismissed. It will be so ordered.

Louis J. O'Marr
Associate Commissioner

We concur in the foregoing:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner

STATUTES INVOLVED

13 Stat. 172. June 25, 1864.

"To enable the Secretary of Interior to take charge of certain stray bands of Winnebago and Potawatomi Indians, now in the State of Wisconsin, with a view to prevent any further depredations by them upon the citizens of that State, and for provisions and subsistence, ten thousand dollars; Provided, That the proportion of annuities to which said stray bands of Potawatomis and Winnebagoes would be entitled if they were settled on their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of Interior in defraying the expenses of their removal, or in settling or subsisting them on any other reservation which may hereafter be provided for them."

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34 Stat. 380 June 21, 1906.

"That the Secretary of the Interior be, and he is hereby, directed to cause an investigation to be made of the claims of the Pottawatomie Indians of Wisconsin, as set forth in their memorial to Congress, printed in Senate Document No. 185, Fifty-seventh Congress, second session, and to report thereon to Congress at the beginning of the next session thereof—

1. Showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the treaty of September 26, 1833.

2. Their proportionate shares of annuities, trust funds, and other moneys paid to or expended for the tribe to

which they belong, in which the claimant Indians have not shared.*

3. The amount of such moneys retained in the Treasury of the United States to the credit of the Claimant Indians as directed by the provision of the act of Congress approved June 25, 1864; if none have been so retained, the amount that should have been annually so retained under said law.

4. Showing, also, what disposition has been made of the annuities, trust funds, and other moneys of said tribe.

5. With the amounts and the status of any now remaining to their credit in the Treasury or otherwise.

6. He will also cause an enrollment to be made of said Pottawatomie Indians."

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38 Stat. 102. June 30, 1913.

"For the purchase of allotments for the individual members of that portion of the Wisconsin Band of Pottawatomie Indians now residing in the States of Wisconsin and Michigan, $150,000, *said sum to be reimbursed to the United States out of the appropriation, when made, of $447,339, the said sum last named being the proportionate share of the said Indians in annuities and moneys of the Pottawatomie Tribe,* in which they have not shared, *as set forth in House Document numbered Eight hundred and thirty,* Sixtieth Congress, first session, and the Secretary of the Interior is hereby authorized to expend the said sum of $150,000 in the purchase of land within the States of Wisconsin and Michigan, the title to such land to be taken in trust by the Government for the use and

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* Secretary's Report (House Doc. # 830, supra) to Cong. respecting "trust and other moneys (sale of surplus land), copy in Appendix p.)

benefit of said Indians, said land to be situated in organized school districts and to be purchased in bodies of not more than one section, which said bodies shall not adjoin each other: Provided, That the land so purchased, except such part thereof as may be necessary for administrative purposes, shall be divided equitably among the Indians entitled thereto, and patents therefor shall be issued in accordance with the general allotment laws of the United States: Provided further, That the Secretary of the Interior may, in his discretion, withhold allotments from any Indian or Indians belonging to this band who, owing to advanced age or other infirmities, are deemed by him incapable of making beneficial use thereof; and in lieu of formal allotments to Indians falling within this class tentative allotments of land may be made to such Indians for occupancy and use during the remainder of their natural lifetime." (Emphasis supplied)

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38 Stat. 607

Act of Aug. 1, 1914

"The money appropriated in section twenty-four of the Indian appropriation Act of June thirtieth, nineteen hundred and thirteen (Public numbered four), for the purchase of allotments for the individual members of that portion of the Wisconsin Band of Pottawatomie Indians now residing in the States of Wisconsin and Michigan, is hereby reappropriated and made available for the purpose for which appropriated and shall remain available until expended."

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39 Stat. 156 May 28, 1916.

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said

Indians in establishing homes on lands purchased for them under the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen, $100,000, or so much thereof as may be necessary, *said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe,* in which they have not shared, *as set forth in House Document numbered Eight hundred and Thirty* (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $100,000 in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: Provided, That in order to train said Indians in the use and handling of money, not exceeding $25,000 of the above appropriation may be paid to them per capita, or, be deposited to their credit subject to expenditure in such manner and under such rules and regulations as the Secretary of Interior may prescribe." (Emphasis Supplied)

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38 Stat 991, March 2, 1917.

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen, $100,000 or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Potawatomie Tribe in which they have

not shared, as set forth in House Document numbered Eight hundred and thirty (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said some of $100,000 in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: Provided, That in order to train said Indians in the use and handling of money, not exceeding $25,000 of the above appropriation may be paid to them per capita, or be deposited to their credit subject to expenditure in such manner and under such rules and regulations as the Secretary of Interior may prescribe." (Emphasis Supplied).

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40 Stat. 589 March 25, 1918.

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under *the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen,* $75,000, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, *of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared as set forth in House Document numbered Eight hundred and thirty* (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $75,000 in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: Provided, That from the sum herein appropriated for said Pottawatomie In-

dians the Secretary of Interior is hereby authorized to pay to the legal representatives of R. V. Belt (Mrs. Joana Belt and William O. Belt) such sum not exceeding $25,000 as he, after a proper hearing, may fix as compensation justly and equitably due the said Belt and associated on a quantum meriut for their services in recovering for the said Pottawatomie Indians the annuities withheld from them, under contract with representatives of said Indians, approved by the Commissioner of Indian Affairs November first, nineteen hundred and two." (Emphasis Supplied)

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41 Stat. 29 June 30, 1919.

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them *under the provisions of the Act of Congress, approved June 30, 1913,* $15,500, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, *of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared as set forth in House Document numbered 830* (Sixtieth Congress, first session) and the Secretary of the Interior is hereby authorized to make a per capita payment of $40 to said Indians out of said funds: Provided, That no further expenditures be authorized or made under appropriations heretofore enacted making provision for the purchase of land and the clearing of same for said Pottawatomie Indians: Provided further, That from the sums heretofore appropriated for said Pottawatomie Indians the Secretary of the Treasury is hereby authorized and directed to pay to Erik O. Morstad of Iona, Wisconsin, in person and in full satisfac-

tion for services rendered, the sum of $2,000." (Emphasis supplied)

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45 Stat. 911 May 29, 1928.

"Payment to Pottawatomie Indians of Wisconsin and Michigan: For the Wisconsin Pottawatomie Indians of Wisconsin and Michigan, $6,839. This sum being the unappropriated balance found due said Indians under the Treaty of September 27, 1833 (Seventh Statutes at Large, page 442), and the Act of June 25, 1864 (Thirteenth Statutes at Large, page 172); and the unexpended balances of appropriations made for this purpose by the Acts of May 18, 1916 (Thirty-ninth Statutes at Large, page 156), May 25, 1918 (Fortieth Statutes at Large, page 589), and June 30, 1919 (Forty-first Statutes at Large, page 29), aggregating $37,004.55, together with the unexpended balance of $4,347.73 of the appropriation for the purchase of land for said Indians contained in *the Act of June 30, 1913* (Thirty-eighth Statutes at Large, page 102), which have been carried to the surplus fund of the Treasury, are hereby reappropriated; and the foregoing amounts aggregating $48,231.28 shall remain available until June 30, 1929, and be subject to expenditures for the benefit of said Indians, or payment to them, in the discretion of the Secretary of the Interior, as authorized by the Act of February 29, 1928." (Emphasis Supplied)

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33 Stat. 201. Kapp. III, 282. Distribution of Trust Funds. 5/1, 1907.

"That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the Pottawatomie Indians in Kansas the sum of two hundred and thirty thousand and sixty-four

dollars and twenty cents, being the unappropriated balance of the sum of eight hundred fifty thousand dollars due the Pottawatomi tribe under the provisions of article seven of the treaty of June fifth and seventeenth, 1846 (9 Stat. 853), and the Secretary of the Interior is authorized to pay per capita to the members of the Pottawatomie tribe of Indians in Kansas the said sum, under such rules and regulations as may be prescribed by him and in the same manner as provided by the Act of April twenty-first, nineteen hundred and four (33 Stat. 201);

In all, two hundred and thirty-nine thousand one hundred and two dollars and ten cents."

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36 Stat. 269. April 4, 1910 Commutation of Annuities.

"Chap. 140,—An act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes for the fiscal year ending June thirtieth, nineteen hundred eleven."

* * *

The agreement with the Pottawatomie Tribe of Kansas and Wisconsin dated March 16, 1909;

And the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the said tribes, respectively, the sums hereinafter specified, said sums being a capitalization of the perpetual annuities of said tribes on the basis of five per centum, and the same having been accepted by said tribes in the agreements heretofore mentioned in lieu of and as a commutation of said perpetual annuities, to wit:

* * *

The Pottawatomie Tribe of Kansas and Wisconsin, one hundred and eighty thousand seven hundred and fifty-eight dollars; * * *"

DEFENDANT'S EXHIBIT 40

1 [Senate Document No. 185, Fifty-seventh Congress, second session.]

POTTAWATOMIE INDIANS OF WISCONSIN.

MEMORIAL OF THE POTTAWATOMIE INDIANS OF WISCONSIN, ASKING FOR CONSIDERATION OF THEIR CLAIM FOR THEIR PROPORTIONATE SHARES OF THE TRIBAL ANNUITIES, INTEREST ON TRUST FUNDS, AND OTHER MONEYS AND ESTATE OF THE POTTAWATOMIE NATION OF INDIANS.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your memorialists, the Pottawatomie Indians of Wisconsin, respectfully petition your honorable body to give consideration to their claims for their proportionate shares of the annuities, interest on the trust funds, other moneys, or other estate of the Pottawatomie Nation of Indians.

We are, and always have been, members of the United Nation of Chippewa, Ottawa, and Pottawatomie Indians, now known as the Pottawatomie Nation, which name, so written, was adopted by said Indians in and by the treaty of 1846, as will be hereinafter more fully shown.

We have never, knowingly or intentionally abandoned our membership in the tribe, nor any of our rights in and to the tribal estate in whatever form it has existed from time to time, whether in lands, annuities, interest on trust funds, or otherwise.

We have not, for many years past, shared in any of the payments of money made to the Indians of the said tribe or nation, from the tribal annuities or other funds, nor in any other tribal benefits, notwithstanding our whereabouts have been well known to the department of the Government having the management of Indian affairs.

We have, at various times, requested the consideration of our claims, and for that purpose have sent delegations

to Washington to lay the matter before the Department of the Interior; and appeals have been made by and through influential friends in our behalf, but we have utterly failed to secure what we have believed to be a fair and full consideration of said claims.

The following letters will show the more recent action of the office of Indian Affairs on the matter.

* * * *

Omitted as unnecessary detail.

* * * *

2 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., June 19, 1902.

HON. J. V. QUARLES,
United States Senate, Washington, D. C.

SIR: I am in receipt, by your reference, of the communication addressed to you by E. O. Morstad relative to the claim of the Pottawatomie Indians in Wisconsin for annuities and other benefits under the treaty of September 26, 1833, which they have never received.

In reply I have to inform you that the Indians alluded to lost any and all rights they may have had under said treaty by not removing with their tribe west of the Mississippi River, as provided for by the treaty. A supplemental clause to that treaty, September 27, 1833, provided that a certain class of the tribe would be permitted to remain in Michigan, and their proportion of the annuities would be paid them at L'Arbre Croche. This, however, was not done, and resulted in a suit by the Pottawatomies of Indiana and Michigan, which was decided in their favor (see C. Cls. R., vol. 27, p. 403), and Congress appropriated $104,626 to satisfy the payment, which amount was paid to the Pottawatomies of Indiana and Michigan entitled thereto under the aforesaid supplemental clause.

Certain Indians in Wisconsin claimed to be entitled to share in the judgment, but the department would not recognize their rights.

As a matter of fact, the Wisconsin Pottawatomies have no claim under the treaty of 1833. They give as an excuse for not complying with the stipulations thereof that the making of the treaty was by a few and not understood by the majority, and many refused to remove and thereby forfeited their rights. There is nothing this office can do in the matter.

The letter of Mr. Morstad is herewith returned.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

The conclusions of the Office of Indian Affairs upon the said claims of your memorialists, under the treaty of 1833, are that they "lost any and all rights they may have had under said treaty by not removing with their tribe west of the Mississippi River, as provided by the treaty"; and further, that by not removing they "thereby forfeited their rights." The final statement that "there is nothing this office can do in the matter" compels your memorialists to seek to have their claims considered by some other tribunal. They consider the conclusions
3 of the Office of Indian Affairs as wrong and unjust. They do not believe that all of the provisions of the treaties and laws, or all of the facts bearing upon said claims have been considered; but they are unable to properly present, themselves, the grounds and reasons for their belief as to the injustice of said decisions. Finding themselves unable to proceed with the further prosecution of their claims without competent legal assistance, and having been advised thereto, they have entered into a contract with Hon. R. V. Belt, attorney at law, Washington, D. C., retaining and employing him as their at-

torney and counselor for the prosecution of their said claims.

Through the assistance of their said attorney your memorialists are enabled to present this appeal to your honorable body for the consideration of their claims, setting forth therein a history of the matter, together with the provisions of the treaties and laws on which they base their claims and the facts showing their right to recover on said claims.

Your memorialists humbly petition for the careful and prompt consideration of this memorial, and that such legislation be enacted as will provide for the adjudication and final settlement of their claims as herein set forth.

By a treaty made by the United States August 3, 1795, with the "tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel River, Weas, Kickapoos, Piankashaws, and Kaskaskias" cession of large areas of country was made lying in eastern and southern Ohio and extending into what is now Indiana. (7 Stat. 49.)

The treaty Indians were left in possession of the country in northwestern Ohio, in Indiana, Illinois, Michigan, and Wisconsin, except the portions thereof recognized to be in the occupancy of other Indian tribes.

Subsequently separate treaties were made with portions of the Pottawatomies, as also with other tribes, for cessions of lands in which they were particularly dwelling at the time of the treaties. All of these treaties were made in the progress of the general movement of the Indian tribes farther westward, removing the frontier boundary before the advancing civilization of the white population. Another purpose of those treaties was to more particularly define the tracts of country claimed and occupied by the different tribes. As before stated, the territory of the Chippewas, Ottawas, and Potta-

watomies was on both sides of Lake Michigan, in Wisconsin and Michigan, and extended down into Indiana and Illinois.

By a treaty made with the Chippewas, Ottawas, and Pottawatomies in 1816 (7 Stat., 146), and another made with the Pottawatomie Tribe of Indians of the Prairie and Kankakee (7 Stat., 378), cessions of land were made along the south of Lake Michigan, extending southward into Indiana and Illinois. These cessions served to make a division between the Pottawatomies and affiliated tribes in Wisconsin and Illinois from those of the same tribes living in Michigan and Indiana. By further cession of land made by the Pottawatomies of the States of Indiana and Illinois and Michigan Territory in 1832 they parted with all of their occupancy titles in those States (7 Stat., 399), there being reserved in the ceded country specified tracts for certain bands, and certain detached tracts within the ceded territory were granted to individuals, families, etc., named in the treaty.

The foregoing presents a general view of the situation of the Pottawatomie Tribe of Indians up to the time of the treaty of Chicago, which provided for their removal west of the Mississippi River.

The said treaty of Chicago was concluded as follows:

On September 26, 1833, the chiefs and headmen of the united nation of Chippewa, Ottawa, and Pottawatomie Indians ceded to the United States all of their lands along the western shore of Lake Michigan. This cession extended down into the northern part of Illinois. The consideration for that cession was certain money payments and a new reservation of not less than 5,000,000 acres west of the Mississippi River. This new reservation was located north and west of the Missouri River, with Council Bluffs as the agency location. The treaty provided that the Indians were to remove from the ceded

lands in Illinois immediately on the ratification of the treaty; but they were permitted to remain on the ceded lands in Wisconsin for the period of three years; they were to be removed at the expense of the United States, and also subsisted for one year after their removal. The fourth article of that treaty provides as follows:

"ART. 4. A just proportion of the annuity money, secured as well by former treaties as the present, shall be paid west of the Mississippi to such portion of the nation as shall have removed thither during the ensuing three years. After which time the whole amount of the annuities shall be paid at their location west of the Mississippi. (7 Stat., 431–433.)

On the next day, September 27, 1833, "Articles supplementary" to the treaty concluded on the previous day, as aforesaid, were concluded with the "Chiefs and headmen of the said united nations of Indians residing upon the reservations of land situated in the Territory of Michigan south of Grand River," for the cession, for certain money considerations, of all of their lands in the Territory of Michigan south of Grand River; and by said "Articles supplementary" the said Indians were made parties to the treaty concluded on the previous day, and were to be entitled to all of its benefits and subject to all of its conditions. (7 Stat., 442–448.)

By a memorandum in the nature of a supplemental article to the "Articles supplementary" aforesaid a few of the Indians in Michigan, because of their religious creed, were permitted to remain in that Territory on removing to the northern peninsula thereof, and to receive their proportion of the annuities at L'Arbre Croche.

This combined treaty of September 26 and 27, 1833, was ratified, and was proclaimed on February 21, 1835. (7 Stat., 431–448.)

From 1834 to 1837, 14 or more treaties were concluded with separate bands of the Pottawatomie Indians in the State of Indiana for the cession of tracts of land that had been reserved for them, or of granted tracts secured to them by previous treaties. Money payments constituted the consideration, and the Indians, in all of said treaties except three, stipulated to remove to the reservations west of the Mississippi River in two years from the making of said treaties. (7 Stat., 467–469, 490, 498–501, 505, 513–515, 532).

The Indians soon began to remove to the reservation located on the Missouri River, as before stated, but before many of them had settled thereon the United States found it desirable to ask them to exchange that reservation for one south of the Missouri River, in what is now the State of Kansas. The great body of the Indians were not disposed to remove from their former homes about Lake Michigan. This new request for another change before removal had been effected under the treaty of 1833 did not encourage them in the matter of removal. The adult Indians held that in such an important matter for so radical a change of latitude, climate, etc., the whole tribe should have been consulted, and they did not realize nor recognize the binding force of the treaties concluded with the few chiefs and headmen of the tribes. In this situation military force was employed to secure the removal of those unwilling to remove. Some were so removed, but many evaded the military escorts and scattered about the country, earning their living at trapping, picking berries, etc.

In the annual report of the Commissioner of Indian Affairs for 1836, page 36, it is stated that the Chippewa, Ottawa, and Pottawatomie Indians originally numbered for removal 8,000; that 1,712 had been removed, and that 6,288 remained to be removed. In the same report it is stated on page 41 that the number of Pottawatomies of

Indiana for removal was 3,000, and that 53 of them had been removed.

The annual report for 1837, pages 72 and 73, give different statements as to the number of Indians for removal, and the number removed, but as these and subsequent reports were subsequently stated to be erroneous, it is not considered necessary to make further statements based on them.

In connection with a statement as to the removal of Indians, made in the annual report of the Commissioner of Indian Affairs for the fiscal year 1840–41, the following explanation as to the Chippewas, Ottawas, and Pottawatomies, and the Pottawatomies of Indiana, is found, and it is here given to show the situation at that time. (See pp. 29–30.)

"There has been considerable uncertainty in the estimates formed from time to time of the number of these Indians, and it runs through many years. It appears from the pay rolls that in 1834 there were paid at Chicago, of the united band of Chippewas, Ottawas, and Pottawatomies, 6,734; and of the Pottawatomies of Indiana, 1,346, making an aggregate of 8,080; and the muster rolls show that there were at the same time west, 441. These papers were the foundation, doubtless, of a report and estimate of 1835, and chart of 1836, placing the united band at 8,000, which has since been adopted, except in the year 1837, and that erred as much in the opposite direction. The treaty of Chicago was signed by several chiefs who afterwards became parties to separate treaties for their landed interests in Illinois and Indiana, by which many of them agreed to remove west of the Mississippi and others southwest of Missouri. It is probable that they have been confounded, and a portion of the latter enumerated as of the united band, being parties to the same treaty; that many of them are lost in kindred tribes with which they have mingled, and that the aggregate has

been much diminished by death, as we know a large body did remove, and others not reported may have removed to Canada. All these causes combined, taking into the reckoning whatever number may be known yet to be east, of which we have no accurate knowledge, will furnish the best account that can be given of these Indians. The statement below exhibits the details of the information possessed.

* * * *

Omitted as unnecessary detail.

* * * *

6 In the treaty concluded near Council Bluffs in 1846 (9 Stat., 853) the following is stated in the preamble:

"TREATY WITH THE POTTAWATOMIE NATION.[1]

"Whereas the various bands of the Pottowautomie Indians, known as the Chippewas, Ottawas, and Pottowautomies of the Prairie, the Pottowautomies of the Wabash, and the Pottowautomies of Indiana, have, subsequent to the year 1828, entered into separate and distinct treaties with the United States, by which they have been separated and located in different countries, and difficulties have arisen as to the proper distribution of the stipulations under various treaties, and being the same people by kindred, by feeling, and by language, and having, in former periods, lived on and owned their lands in common, and being desirous to unite in one common country, and again become one people, and receive their annuities and other benefits in common, and to abolish all minor distinctions of bands by which they have heretofore been divided, and are anxious to be known only as the Pottowautomie Nation, thereby reinstating the national character, and whereas the United States are also

[1] The name of this tribe in different treaties spelled very differently.

anxious to restore and concentrate said tribes to a state so desirable and necessary for the happiness of their people, as well as to enable the Government to arrange and manage its intercourse with them: Now, therefore, the United States and the said Indians do hereby agree that said people shall be hereafter known as a nation, to be called the Pottawautomie Nation."

By that treaty the said Indians ceded to the United States their reservation in Iowa for the sum of $850,000. Out of that sum they stipulated for the following payments:

For a new reservation in Kansas (art. 4)	$87,000
For a cash per capita payment (art. 5)	50,000
For expenses of removal (art. 6)	30,000
For subsistence for one year (art. 6)	40,000
Total	207,000
Leaving a balance of	643,000

7 The disposition of this balance is provided for in article 7 of the treaty, which is as follows:

"ARTICLE VII. The balance of the said sum of eight hundred and fifty thousand dollars, after deducting the cost of removal and subsistence, etc., it is agreed shall remain with the United States, *in trust* for said Indians, and an interest of five per cent annually paid thereon, commencing at the expiration of one year after the removal of said Indians, and continuing for thirty years, and until the nation shall be reduced below one thousand souls. If, after the expiration of thirty years, or any period thereafter, it shall be ascertained that the nation is reduced below that number, the said annuity shall thenceforth be paid *pro rata* so long as they shall exist as a separate and distinct nation, in proportion as the present number shall bear to the number then in existence."

Article 10 reads as follows:

"ARTICLE X. It is agreed that hereafter there shall be paid to the Pottowautomie Nation annually the sum of three hundred dollars in lieu of the two hundred pounds of tobacco, fifteen hundred pounds of iron, and three hundred and fifty pounds of steel stipulated to be paid to the Pottowautomies under the third articles of the treaty of September 20, 1828." (9 Stat., 853–856.)

In 1846 there yet remained in the State of Wisconsin a large number of the individual members of the united nation of Chippewas, Ottawas, and Pottawatomies. Their lands having been ceded to the United States they were without any reservation. They did claim to be equally the possessors with the Menominees of the country ceded by the latter tribe in their treaty of 1836, (7 Stat., 506), in which claim they had the support of some of the principal chiefs of the Menominee tribe, and they annually appeared at the annuity payments made to the Menominees to demand their portion of the annuity, but their claim was never recognized. (See Annual Report Commissioner Indian Affairs for 1846, p. 247.)

It was reported in the annual report of the Indian Bureau for 1856, page 41, that about 600 Pottawatomies, strolling through Wisconsin, belong to Kansas Territory."

There were reported to be in that State, at the same time and in about the same stiuation, some troublesome Winnebagoes, who had refused to accompany their tribe to the West, or, having gone West, had returned to Wisconsin. So many complaints were made concerning these Indians that Congress, by the act of June 25, 1864, provided as follows:

"To enable the Secretary of the Interior to take charge of certain stray bands of Winnebago and Pottawatomie Indians, now in the State of Wisconsin, with a view to prevent any further depredations by them upon the citi-

zens of that State, and for provisions and subsistence, $10,000: *Provided,* That the proportion of annuities to which said stray bands of Pottawatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling and subsisting them on any other reservation which may hereafter be provided for them." (13 Stat., 172.)

The same amount, $10,000, was appropriated, and for the same purpose, by the act of March 3, 1865 (13 Stat., 560). By the act of July 26, 1866 (14 Stat., 265), $5,000 was appropriated for the same purpose. This additional provision was contained in the act of March 2, 1867:

"For salary of a special agent to take charge of Winnebago and Pottawatomie Indians now in the State of Wisconsin, $1,500." (14 Stat., 514.)

8 These provisions were repeated in the act of July 27, 1868 (15 Stat., 221), and in the act of April 10, 1869 (16 Stat., 40).

The act of July 15, 1870 (16 Stat., 359), contains the following:

"For this amount, or so much thereof as may be necessary to pay the expenses of the removal of stray bands of Pottawatomie and Winnebago Indians in Wisconsin from their present homes in that State to the tribes to which they respectively belong, as follows:

* * * *

Omitted as unnecessary detail.

* * * *

9 As to the number of the Pottawatomies and Chippewas of the United Nation of Chippewas, Ottawas, and Pottawatomies that remained in the State of Wisconsin, the act of July 15, 1870, and the statement in the annual report of that year afforded the most reliable information accessible to your memorialists. The definite ascertainment of the number of the claimant Indans will be necessary in order to the determination of the exact measure of their claims.

Your memorialists are not informed what action was taken by the Department of the Interior to carry out the legislative directions contained in the act of June 25, 1864, to retain in the Treasury to the credit of the claimant Indians their proportion of the tribal annuities to be disposed of as in that law provided. In the case of the stray bands of Winnebagoes, for whom the same law contained the same directions, the department was subsequently compelled to report that the law had not been observed. From the nature of the action taken by the Office of Indian Affairs upon our claims, as hereinbefore stated, it is presumed that a report by that office as to action taken as to the annuities of the Wisconsin Pottawatomies under that act would be that the law has not been observed.

The stray bands of Winnebagoes have succeeded in having their claims adjusted. Congress, after an investigation of the matter, and learning that the legislative directions of 1864 had not been complied with by the department, passed the act of January 18, 1881 (21 Stat., 315), directing that a census be taken of those Winnebagoes residing in Nebraska and Wisconsin, and that the portion of the annuities of the Wisconsin Winnebagoes be ascertained for the period from the act of 1864 to the date of action under the law; a method of ascertainment and adjustment of the amount of the claims of the Wisconsin Winnebagoes was prescribed by said law. When

the amount of the annuities that inured to the Wisconsin Winnebagoes was ascertained, the whole of which had been paid to that branch of the tribe residing in Nebraska, it was directed that said amount should be recouped from the subsequent annual proportions of the Nebraska Winnebagoes, in such annual amounts as would cause to the latter no absolute distress, and that the sums so recovered should be paid to the Wisconsin Winnebagoes in addition to the proportion of the annuities ascertained to be thereafter due them annually.

The Winnebagoes of Wisconsin were allowed to take allotments of land from the public domain in Wisconsin, and were aided in doing so.

What was done for the Wisconsin Winnebagoes, your memorialists ask may be done for them. The situation of both is exactly parallel, except that the Winnebagoes were removed by military force in the latter part of 1873, but returned to Wisconsin in the early part of 1874. (See Annual Report of Commissioner of Indian Affairs, 1874, pp. 37 and 211; ibid., 1875, p. 100.)

The action of the Commissioner of Indian Affairs on the claims of your memorialists, as hereinbefore stated, may perhaps mislead some in supposing that there has been a determination of the said claims by the suit brought in the Court of Claims under the act of Congress of March 19, 1890 (26 Stat., 24.) In order to avoid this error it will be necessary to state quite fully the facts and situation as to that suit:

Notwithstanding the memorandum or supplemental article forming a part of the "Articles supplementary," concluded on September 27, 1833, at Chicago, whereby certain Catholic Indians were permitted to remain in Michigan on moving from the ceded lands to the northern peninsula of that State, and to receive their annuities at L'arbre Croche, the department neglected to pay to them

their portion of the tribal annuities. They complained to Congress, and on March 2, 1861 (12 Stat., 207), a joint resolution was passed calling on the Department of the Interior for a report of the amount of said annuities then due them. A report was made, stating that the amount found to be due them was $39,000, and that an arrangement had been made with the tribe for the adjustment of the same. Congress thereupon passed the joint resolution of July 28, 1866 (14 Stat., 370), directing payment of that amount out of the trust funds of the tribe, the same to be received by the Michigan Pottawatomies in full of all their claims to that date. The Michigan Pottawatomies received the money, but subsequently insisted that it was not a full and fair adjustment of their said claims; and on the showing made, Congress authorized them to bring suit in the Court of Claims to determine their rights.

Under the said act two petitions were filed in the Court of Claims, one, No. 16743, on behalf of 91 Indians, and the other, No. 16842, on behalf of 1,371 Indians. The Attorney General, representing the United States, first moved to consolidate the two cases, but subsequently, contending that the petitioners in No. 16842 were not within the jurisdictional act, moved the dismissal of that case. The court reserved action on both motions until its final decision, and disposed of them therein as follows:

* * * *

Omitted as not pertinent.

Discussion of 27 Ct. Cl. 403.

* * * *

11 Your memorialists, the Pottawatomie Indians of Wisconsin, base their claims now under consideration upon the broad ground of their right, as members of the tribe, to share, according to their numbers, in the tribal estate, in whatever form it has existed, for the years covered by said claims. That right was specially

preserved to them by the act of Congress of June 25, 1864. (13 Stat., 172.) That law stands to this day unrepealed, and under its provisions your memorialists come asking that their proportion of the tribal estate so preserved to them be distributed to them to meet their pressing needs. Your memorialists have been, for many years past, earning their support in civilized pursuits; they have provided for themselves and their children with money earned at hard labor in lumbering camps and other industries in the State of Wisconsin; they do not live in tribal relation, and have no desire to be herded on a reservation to be supported by the United States; they would be glad to be assisted in acquiring allotments of land on the public domain, and to have a school provided for their children; they have had no school facilities, and they and their children have suffered greatly thereby.

* * * *

Omitted as not pertinent.

* * * *

13 In order, therefore, to show, as near as they are able, the extent and measure of their claims, your memorialists will adopt the number 700 as representing them. When their number shall have been more certainly ascertained, the amount of their claims can be stated with greater exactness.

The treaty of 1833 having been ratified and proclaimed February 21, 1835, and the Indians being under obligations to remove within three years, it is presumed that they shared in the distribution of the tribal annuities made prior to February 21, 1838.

* * * *

Statement showing the tribal annuities and interest on trust fund of the United Nation of Chippewa, Ottawa, and Pottawatomie Indians for the period from 1838 to 1863, inclusive, 26 years, and for the period from 1864 to 1902, 39 years.

Treaty	Annual amount	Time	Amount due nation for 26 years, from 1838 to 1863.	Amount calculated for nation for 39 years, from 1864 to 1902
Aug. 3, 1795 (7 Stat., 49)	$1,000	Perpetual	$26,000	$39,000
Sept. 30, 1809 (7 Stat., 113)	500	....do	13,000	19,000
Oct. 2, 1818 (7 Stat., 185)	2,500	....do	65,000	97,500
Aug. 29, 1821 (7 Stat., 218)	5,000	20 years	20,000	
Oct. 16, 1826 (7 Stat., 295)	2,000	22 years	22,000	
Sept. 20, 1828 (7 Stat., 317)	2,000	Perpetual	52,000	78,000
Do	1,000	20 years	11,000	
July 29, 1829 (7 Stat., 320)	16,000	Perpetual	416,000	624,000
Oct. 20, 1832 (7 Stat., 378)	15,000	20 years	225,000	
Oct. 26, 1832 (7 Stat., 394)	20,000	....do	300,000	
Oct. 27, 1832 (7 Stat., 399)	15,000	12 years	105,000	
June 17, 1846 (9 Stat., 853)	300	Perpetual	5,100	11,700
Do	32,150	Annual interest on trust fund.	546,550	1,253,850
Total			1,806,650	2,123,550

Where the annuities are for a term of years, the unexpired time only is calculated in the first period. As all of the annuities for a stated term of years expired before the second period, no amounts are carried forward thereon for any one of them for that period.

There are other treaty obligations of the United States to the said Indians for education, etc., not calculated in the above.

If the aggregate of the sum inuring to the said United Nation of Indians from their annuity and interest-bearing trust funds for the period from 1838 to 1863, inclusive, $1,806,650, had been distributed to the 3,803 members of the tribe (291 in Michigan, 2,812 west of Mississippi River, and 700 in Wisconsin), the proportion for each individual would have been $475.06. Therefore, for that period the 700 Pottawatomies of Wisconsin were deprived of the aggregate sum of $332,542.

If like distribution had been made of the annuities and interest on the trust fund for the period from 1864 to 1902, inclusive, $2,123,550, the share of each individual would have been $558.38. For that period the aggregate sum for the Pottawatomies of Wisconsin, 700 in number, would have been $390,866.

The aggregate sum of the annuities of the United Nation and of the interest on the trust fund, of which the claimant Indians are shown to have been deprived is $723,408. This does not include any portion of the treaty provision for education and some other specific treaty obligations of the United States.

14 A few of your memorialists did get to the reservation of the tribe west of the Mississippi River and drew their proportionate shares of the tribal moneys or payments at one or, perhaps, two annuity payments, and subsequently returned to Wisconsin but not many did so.

The fact that a portion of the annuity and interest-bearing funds of the tribe or nation was distributed to some of the members who became citizens of the United States does not in anywise affect the sum that should have annually been retained in the Treasury of the United States to the credit of the Pottawatomies of Wisconsin under the law of 1864.

The claim set up by the office of Indian Affairs that your memorialists have "lost" or "forfeited" their treaty rights by not removing with the tribe is not true as a matter of fact, is not true as a matter of law, and is contrary to all principles of equity governing such cases.

"The word 'forfeiture' means the judicial transfer of title to property as punishment for crime. (Tompkins Law Dic., 'Penalties'; 'Forfeitures'; Bouv. Law Dic., 'Fines'; Cruise Digest, 'Fines'; Shep. Touch., 'Fines.')

"Forfeiture means the loss of something as a penalty for doing or omitting to do a certain required act. The taking of some property, right, privilege, franchise, or benefit from one person and transferring it to another. A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments whereby he loses all his interest therein and they become vested in the party injured as a recompense for the wrong done, which he alone, or the public together with himself, has sustained." (Am. and Eng. Enc. of Law, vol. 8, p. 443; 2 Black. Com. 267.)

The office of Indian Affairs does not show, nor attempt to show, to whom the shares of the annuities, etc., of the claimant Indians were forfeited. If, by not removing, the claimant Indians committed any crime for which any specific penalty was annexed, or failed to perform any duty enjoined by law, who suffered thereby? To whose benefit did the money or thing alleged to have been forfeited inure? By whom was determined and declared the forfeture?

"A forfeiture must be judicially declared." (Bouv. Law Dic., 'Forfeiture,' and cases cited.)

In order to authorize a claim to forfeiture of valuable property on account of violation of a condition, proceedings to enforce must be had. (Bouv. Law Dic.; 17 Or., 140.)

The Office of Indian Affairs does not show when, by whom, or where the proceedings were had to enforce the forfeiture of the annuities, etc., of the claimant Indians.

"In courts of law equity will not enforce a forfeiture or penalty except when exclusively essential to do justice." (Am. and Eng. Enc. of Law, vol. 8, p. 446.)

"Equity never lends its aid to enforce a forfeture or penalty, or anything in the nature of either." (Marshall v. Vicksburg, 15 Wall., 146.)

These elementary principles of the law of forfeiture will enable all to a better understanding of this case.

The treaty of 1833 contains no condition of forfeiture. It does require, after a specified time, that all payments of annuities to the Indians shall be made on the reservation west of the Mississippi River. It does not declare that all annuities, after that specified time, shall be distributed to those Indians who shall have removed. It does not give to the Department of the Interior, or any other branch of the Government, the power and authority to declare a forfeiture of the annuities, etc., of any of the Indians. The duty of the Department of the Interior as to the annuities of these Indians who failed to remove, as required by the treaty, was to have withheld them until the Indians entitled to them did remove, or, if they failed to remove at all, until Congress should direct as to the disposition to be made of them.

If any party was entitled to a declaration of forfeiture of the annuities, etc., of the claimant Indians, it was the United States. No other party suffered by any failure of the claimant Indians to remove West. The executive branch of the Government should have retained the annuities of these Indians failing to remove until proper disposition should have been made thereof by action of Congress, or the judicial determination of some court of competent jurisdiction. It was not in the power of the executive to effect a forfeiture of the annuities of the claimant Indians and to turn the money thus held to be forfeited over to individuals who could show no right to receive it.

In the recent case of the New York Indians *v.* United States, 170 U.S. 1, decided by the Supreme Court of the United States, strong opposition is taken to forfeitures by executive action.

In that case was involved a condition of forfeiture annexed by a treaty to certain lands reserved for said In-

dians, in exchange for lands then held and claimed by them, if the Indians did not remove, as provided in the treaty, to the new reservation in the State of Kansas. The Indians, except a very few, never did remove. The executive branch of the Government took action opening the reserved lands to public settlement, claiming that they had been forfeited by the Indians.

The court, in discussing the question of forfeiture in that case, said, among other things, the following:

"In the view we have taken of the granting clause of this treaty, the provisions of the third article created a condition subsequent, upon the breach of which the Government might declare a forfeiture, but had no power by simple executive action to reenter, take possession of the lands, and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may reenter in the case of the breach of a condition subsequent, and the Government, which can only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of United States *v.* Repentigny (5 Wall., 211, 267), in which the court said: 'We agree that before a forfeiture or reunion with the public domain could take place a judicial inquiry should be instituted or, in the technical language of the common law, office found, or its legal equivalent. The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government without these preliminary proceedings.' Practically the same language was used with reference to a grant of lands in aid of a railroad in Schulenberg *v.* Harriman (21 Wall., 44, 63); in Farnsworth *v.* Minnesota and Pacific Railroad (92 U. S., 49), and in Van Wyck *v.* Magee (115 U. S., 469), it was said that 'legislation to be sufficient (for the purpose) must manifest an intention by Congress to reassert title and resume possession. As it

is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing a right, it should be direct, positive, and free from all doubt or ambiguity.' (See also Pacific Railway Co. *v.* United States, 124 U. S., 124.) As there is no pretense that any such action as is contemplated by these cases was ever taken, it necessarily follows that if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revert the title to the Government.

"5. But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized the forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed, or defect in the evidence to show a breach will be taken most strongly against him and in favor of
16 the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture." (Jones on Real Prop., secs. 678, 679; New York Indians *v.* United States, 170 U. S. 25.)

No compliance with any of the legal requirements necessary to effect a forfeiture of any of the treaty rights of the claimant Indians is shown. The United States, the only party that could have any right to be recompensed by any such forfeiture, if legally adjudged and declared, waived any such right by the enactment of the law of 1864. That law preserved to the claimant Indians their proportionate shares of the tribal annuities, etc. Any unwarranted executive action as to the annuities of the claimant Indians prior to that law, and any failure of the executive branch of the Government after the date of that law, to comply with its requirements, or to observe its provisions, can not divest the claimant Indians of their

treaty rights to their proportionate shares of the tribal annuities, etc. The whereabouts of the claimant Indians were well known to the department, as is abundantly attested by the public records.

Your memorialists, having herein shown that their claims rest upon the sure foundations of treaty, law, and justice, respectfully petition your honorable body to give them their prompt and full consideration and investigation, and to enact such legislation as will require the speedy ascertainment and enrollment of the claimant Indians and an accounting showing what amounts have been withheld from them of the annuities, interest on trust fund, and other moneys, or estate of the Pottawatomie Nation of Indians from the date of the treaty of 1833 to and including the year 1863, and also for the additional period from 1864 to the present time. When this shall have been done, your memorialists urgently request that prompt payment of the amount so found to be due and payable to them be distributed to those entitled to receive it.

Your memorialists also request that a school affording advantages and facilities for the eduction of our children be established and maintained at some point in the State of Wisconsin found to be most convenient for the greatest number of them.

And your petitioners will ever pray.

Adopted by the Pottawatomie Indians of Wisconsin in council assembled at Carter, in Forest County, Wis., this 17th day of September, 1902.

CHARLES KISHECK,
President of the Council.

JOHN GHUNDEER,
Secretary of the Council.
R. O. BECK, *Counsel.*

* * * *

DEFENDANT'S EXHIBIT 41

HOUSE OF REPRESENTATIVES

60TH CONGRESS, *1st Session.*
DOCUMENT No. 830.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

APRIL 2, 1908.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, April 1, 1908.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES:

I have the honor to invite your attention to the following act of Congress, approved June 21, 1906 (34 Stat. L., 380):

That the Secretary of the Interior be, and he is hereby, directed to cause an investigation to be made of the claims of the Pottawatomie Indians of Wisconsin, as set forth in their memorial to Congress, printed in Senate Document No. 185, Fifty-seventh Congress, second session, and to report thereon to Congress at the beginning of the next session thereof—

1. Showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the treaty of September 26, 1833.

2. Their proportionate shares of the annuities, trust funds, and other moneys paid to or expended for the tribe

to which they belong, in which the claimant Indians have not shared.

3. The amount of such moneys retained in the Treasury of the United States to the credit of the claimant Indians as directed by the provision of the act of Congress approved June 25, 1864; if none have been so retained, the amount that should have been annually so retained under said law.

4. Showing, also, what disposition has been made of the annuities, trust funds, and other moneys of said tribe.

5. With the amounts and the status of any now remaining to their credit in the Treasury or otherwise.

6. He will also cause an enrollment to be made of said Pottawatomie Indians.

2 and in complying with the provisions thereof, in the order stated in the act, I submit the following report:

1. Showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the treaty of September 26, 1833.

The treaty of September 26, 1833 (7 Stat. L., 431), was not ratified and proclaimed until February 21, 1835, and by its terms the Indians were permitted to retain possession, for the term of three years, of the country north of the boundary line of the State of Illinois (article 2). Removal from Wisconsin was therefore not required until after February 21, 1838, and article 4 of said treaty provided for payment of annuities secured by former treaties and the one then under negotiation, in accordance with this plan of emigration.

The report of the Commissioner of Indian Affairs for the fiscal year 1840 to 1841 (pages 253 and 254 of the consolidated reports for 1838-1842), in reviewing the then

existing sources of information relative to the number of the Pottawatomie Indians, shows that a total of 1,137 members of the tribe had fled to Canada after the ratification of the treaty of 1833 and prior to 1840; that the total number of these Indians remaining at their old homes in the States was 2,087 in 1840, of which number 950 were in Michigan, south of Grand River. If the number who fled to Canada from Wisconsin and Michigan was proportionate to the number which remained in each of said States, than 619 of those who went to Canada belonged to the Wisconsin band and 518 to the Michigan band. Supplementing these figures with the census taken in 1870 by Special Indian Agent D. A. Griffith (Report of Commissioner of Indian Affairs for 1870, p. 323), showing 928 members of the tribe then in Wisconsin, and the enrollment made by Doctor Wooster, completed January 18, 1908, more particularly referred to hereinafter, the following table has been constructed:

TABLE No. 1.—*Location and number of the Wisconsin band of Pottawatomie Indians.*

	Number in Wisconsin.	Number in Canada.	Total number.
1840	1,137	619	1,756
1870	928	(a)	.....
1908	457	1,550	2,007
Average	841	1,084	.....
Total average	.....	.....	1,925

(a) Not known.

By taking the average number of the tribe in Wisconsin and adding it to the average number in Canada, rather than averaging the two total numbers, effect is given to the figures for 1870.

2. Their proportionate shares of the annuities, trust funds, and other moneys paid to or expended for the tribe

to which they belong, in which the claimant Indians have not shared.

The total of such funds as estimated in accordance with statements Nos. 1 to 6, inclusive, hereto attached, amounts to $1,964,565.87. However, it will be seen by reference to table No. 2, page 6 hereof, that the treaty of July 29, 1829 (7 Stat. L., 320), providing for a perpetual annuity of $16,000, was made with the "Chippewas, Ottawas, and Pottawatomies;" that the treaty of October 20, 1832 (7 Stat. L., 378), providing for a twenty-year annuity of $15,000, was entered into with the "Pottawatomies of the Prairie and Kankakee;" that the treaty of October 26, 1832 (7 Stat. L., 394), providing for a twenty-year annuity of $20,000, was made with the "Pottawatomies of the Wabash," and that the treaty of October 27, 1832 (7 Stat. L., 399), providing for a twelve-year annuity of $15,000, was made with the "Pottawatomies of Indiana and Michigan Territory." These various bands of Indians were united into one tribe, to be thenceforward known as the "Pottowautomie Nation," by the provisions of the treaty of June 17, 1846 (9 Stat. L., 853), and were thereafter to "receive their annuities and other benefits in common," and as soon as the provision of said treaty could be put into effect their annuities and other moneys were so paid. Prior to the treaty of 1846 these annuities seem to have been paid to the several bands with which the treaties were negotiated, but as the Court of Claims, in the case of the Pottawatomie Indians *v.* The United States (27 C. C., 403, VIII finding of fact), placed these annuities on the same footing with the other annuities of the Pottawatomie tribe, no distinction has been made in the statements submitted herewith, and they have been reckoned as a part of the common annuities of the tribe for the entire period from 1838 to 1907, inclusive.

3 The amount of such moneys retained in the Treasury of the United States to the credit of the claimant

Indians as directed by the provision of the act of Congress, approved June 25, 1864; if none have been so retained, the amount that should have been annually so retained under said law.

No moneys have been retained in the Treasury of the United States to the credit of the said Wisconsin Indians, as directed by the act of June 25, 1864. Owing to the fact that a census of the Wisconsin band has not been taken annually, it is impossible to give the amount which should have been annually retained in the Treasury of the United States under said act. The average annual amount which should have been retained in accordance with the act of June 25, 1864, is estimated to be $24,809.997.

4. Showing also what disposition has been made of the annuities, trust funds, and other moneys of said tribe.

The annuities of said tribe are shown in the following table:

TABLE No. 2.

Treaty.	United States Statutes	Tribe payable to.	Amount.	Time.
Aug. 3, 1795	7-49, art. 4	Pottawatomies	$1,000	Perpetual.
Sept. 3, 1809	7-113, art. 3	do	500	Do.
Oct. 2, 1818	7-185, art. 3	do	2,500	Do.
Aug. 29, 1821	7-218, art. 4	do	5,000	20 years.
Oct. 16, 1826	7-295, art. 3	do	2,000	22 years.
Do.	7-295, art. 3	do	a 160	Perpetual.
Sept. 20, 1828	7-317, art. 2	do	1,000	20 years.
Do.	7-317, art. 2	do	2,000	Perpetual.
July 29, 1829	7-320, art. 2	Chippewas, Ottawas, and Pottawatomies	16,000	Do.
Do.	7-320, art. 2	do	b 50	Do.
Oct. 20, 1832	7-378, art. 3	Pottawatomies of the Prairie and Kankakee	15,000	20 years.
Oct. 26, 1832	7-394, art. 3	Pottawatomies of the Wabash	20,000	Do.
Oct. 27, 1832	7-399, art. 4	Pottawatomies of Indiana and Michigan Territory	15,000	12 years.
Sept. 26, 1833	7-431, art. 3	Chippewas, Ottawas, and Pottawatomies	14,000	20 years.
Sept. 27, 1833	7-442, art. 2	do	2,000	Do.
June 17, 1846	9-853, art. 10	Pottowautomie Nation	300	Perpetual.

a Bushels of salt. b Barrels of salt.

For other funds received under the treaty of 1846 and their disposition, see statements Nos. 2, 3, 4, and 5 attached hereto.

4 After the treaty of 1833 (7 Stat. L., 431), the annuities shown in the foregoing table were paid in Wisconsin, Indiana, and Michigan, and a portion west of the Mississippi, to the members of the several bands named, until 1838, after which time they were paid in accordance with article 4 of said treaty of 1833 to the members of the several bands west of the Mississippi (with the exception of certain payments made to the Pottawatomies who remained in Michigan on account of their religion until 1846. After the treaty of June 17, 1846 (9 Stat. L., 853), the annuities of the said tribe were paid except certain shares commuted in accordance with the provisions of the treaty of 1861 (12 Stat. I , 1191), to the several bands in Kansas who were under the jurisdiction of the former Pottawatomie and Great Nemaha Agency and the present Pottawatomie Indian School located at Hoyt, Kans.

The cash payments of $120,000 (see statement No. 2), and the interest on the balance of the purchase price of the lands ceded to the United States by the treaty of June 17, 1846, amounting to $32,150 annually (see statement No. 3), were paid to the members of the "Pottowautomie Nation" who emigrated to Kansas and were enrolled subject to the jurisdiction of the agent in charge at the Pottawatomie and Great Nemaha Agency.

The balance of the purchase price of the lands ceded to the United States by the treaty of June 17, 1846 (see statements Nos. 2 and 6), amounting to $643,000, was paid in part, from time to time, to the several members of the tribe to whom allotments in severalty were made in accordance with the treaty of 1861, as modified by later agreements, until in 1875 said principal was reduced to

$230,064.20. One hundred and forty-eight thousand eight hundred and forty-four dollars and fifty-one cents of this $230,064.20 was paid to the Pottawatomies in Kansas in the first quarter of the fiscal year 1908, in accordance with the provisions of the act of March 1, 1907 (34 Stat. L., 1031). The balance, of $81,219.69, being the shares of certain minors and incompetents, was retained in the Treasury of the United States in accordance with the act of April 21, 1904 (33 Stat. L., 201).

The lands in Kansas, acquired under the provisions of the treaty of 1846 (9 Stat. L., 853), were subdivided in accordance with the provisions of the treaty of 1861 (12 Stat. L., 1191), as modified by the treaty of March 29, 1866 (14 Stat. L., 763), and the agreement of February 27, 1867 (15 Stat. L., 531), and allotments in severalty were made at various times to the members of the tribe who were deemed competent to manage their own lands and funds, until 1,551 members, constituting about two-third of the total membership of the nation, had received allotments, aggregating 152,128.94 acres. (Report of Wolcott and Ross, 1863, allotments to Pottawatomies.) To each of those to whom allotments in severalty were made under the treaty of 1861, as modified by later agreements, the commuted value of their share in all annuities and trust funds of the tribe was also paid.

Approximately, 84,089.62 acres of the lands in Kansas, acquired under the provisions of the treaty of 1846 were also set aside for those who desired to hold their lands in common. (See statement No. 5.) These lands have been subsequently allotted to the several members of the Kansas bands (who had previously declined to take advantage of the provisions of the treaty of 1861), in accordance with the act of February 28, 1899 (30 Stat. L., 909), as amended by the act of March 3, 1903 (32 Stat. L., 982, 1007), until there now remains only 500.62 acres unallotted (Report of Commis-

sioner of Indian Affairs, 1906, p. 457), 319 acres reserved for the use of the school and 1 acre reserved for church purposes.

The interest on the funds shown in Table No. 3, following, has been applied to the support of the schools maintained for the Pottawatomie tribe. The members of the Wisconsin band have resented all attempts on the part of the Indian Service to place them in schools, and even now are afraid of being compelled to attend. (See p. 10 of Doctor Wooster's Report to the Commissioner of Indian Affairs, December 18, 1907, copy of which is attached.)

• • • •

Omitted as unnecessary detail

6 6. He will also cause an enrollment to be made of said Pottawatomie Indians.

During the fall of 1906 a roll of the Pottawatomies in Wisconsin was prepared, but was not considered sufficiently correct on which to base this report. On June 28, 1907, a clerk of the office of the Commissioner of Indian Affairs was detailed to proceed to Wisconsin and other points to prepare a roll of the Wisconsin Pottawatomies. His roll and report were completed and submitted to the Commissioner of Indian Affairs December 18, 1907 (a copy of report is inclosed), showing 1,880 found by him to be entitled to enrollment. A supplemental roll has been submitted by him, dated January 18, 1908, containing 127 additional names, making a total of 2,007 persons enrolled. These rolls are believed by the Commissioner of Indian Affairs to be as nearly correct and complete as it is practicable to make them. Of the total number enrolled 457 reside in Wisconsin and Michigan and 1,550 in the Dominion of Canada. The numbers so found have been used in compiling the data necessary for this report.

The unusual difficulties attending the making of this roll, and the compilation of the data necessary to deter-

mine the approximate interest of the Wisconsin
7 band in the annuities and other funds of the tribe, have delayed the rendition of this report.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

STATEMENT NO. 1.

Showing the amount of limited and perpetual annuities due and paid the Pottawatomie Indians west of the Mississippi River, from 1838 to 1863, and the amount that would have been due from 1864 to 1907, inclusive, had no payment of trust funds, etc., been made under the treaty of 1861.

As the members of the Wisconsin band of Pottawatomies were not required to remove west until after February 21, 1838, it is presumed, and apparently admitted by them in their memorial (Senate Document No. 185, Fifty-seventh Congress, second session), that they shared in the distribution of the tribal annuities up to and including the year 1837.

Articles II and III of the treaty of 1861 (12 Stat. L., 1191), required the United States Indian agent for the Pottawatomie tribes in Kansas to take an accurate census of them, in separate lists, and provided for the distribution of the proportionate share of the cash value of all the tribal funds, to such allottees of the tribe as were deemed capable of citizenship. In accordance with these provisions, as modified by later acts, about two-thirds of the residents of the tribe in Kansas did become citizens, and received their distributive share of the estimated cash value of all annuities and other funds of the tribe. As the Wisconsin band of Pottawatomies did not share in this distribution, nor in the payment of annuities, after

1838, all limited and perpetual annuities will be treated as though the aforesaid treaty of 1861 had not been entered into, and as though no division of funds had been made.

Congress, by the act of June 25, 1864 (13 Stat. L., 172), provided as follows:

For deficiencies in subsistence and expenses of removal and support of the Sioux and Winnebago Indians of Minnesota, during the fiscal year ending June 30, 1864, $137,293.40: *Provided,* That the portion expended in behalf of the Winnebagoes shall be reimbursed to the Treasury upon the sale of their lands in Minnesota to enable the Secretary of the Interior to take charge of certain stray bands of Winnebago and Pottawatomie Indians, now in the State of Wisconsin, with a view to prevent any further depredations by them upon the citizens of that State; and for provisions and subsistence, $10,000: *Provided,* That the proportion of annuities to which said stray bands of Pottawatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling and subsisting them on any other reservation which may hereafter be provided for them.

As the effect to be given this statute in determining the proportionate share of the Wisconsin Pottawatomies in the annuities of the tribe has not been judicially determined, the table following is submitted, showing the total annuities of the tribe for the two periods from 1838 to 1863, inclusive, twenty-six years, and from 1864 to 1907, inclusive, forty-four years.

Treaty.	Annual amount.	Time.	Amount due nation from 1838 to 1863, inclusive (26 years).	Amount due nation from 1864 to 1907, inclusive (44 years).
August 3, 1795	$1,000.00	Perpetual	$26,000.00	$44,000.00
September 30, 1809	500.00	do	13,000.00	22,000.00
October 2, 1818	2,500.00	do	65,000.00	110,000.00
August 29, 1821	5,000.00	20 years	20,000.00	
October 16, 1826	2,000.00	22 years	22,056.00	
Do	a 160	Perpetual	1,400.00	2,464.00
September 20, 1828	2,000.00	do	52,000.00	88,000.00
Do	1,000.00	20 years	11,000.00	
July 29, 1829	16,000.00	Perpetual	416,000.00	704,000.00
Do	b 50	do	1,300.00	2,200.00
October 20, 1832	15,000.00	20 years	225,000.00	
October 26, 1832	20,000.00	do	300,000.00	
October 27, 1832	15,000.00	12 years	105,000.00	
September 26, 1833	14,000.00	20 years	224,000.00	
Do	2,000.00	do	32,000.00	
June 17, 1846	300.00	Perpetual	5,100.00	13,200.00
Total			1,518,856.00	985,864.00

a Bushels of salt. b Barrels of salt.

* * * * *

Omitted as unnecessary detail

9 STATEMENT No. 2.

The treaty of June 17, 1846, Article II (9 Stat. L., 853), ceded to the United States all the lands granted to the Pottawatomie Nation by the treaty of September 26, 1833. (7 Stat. L., 431.)

Article III of the treaty provided as follows:

In consideration of the foregoing cessions or sales of lands to the United States, it is agreed to pay to said tribes of Indians the sum of $850,000, subject to the conditions, deductions, and liabilities provided for in the subsequent articles of this treaty	$850,000.00

The deductions were to be as follows:

By Article V. For payment of first annuities to enable the Indians to pay their debts before leaving for their new homes, to pay for their improvements, etc	$50,000.00

By Article VI. To pay expenses for removal of the Upper and Lower bands and subsistence for twelve months after their arrival at new homes	70,000.00	
Total cash payments	120,000.00	
By Article IV. Payment to the United States for 576,000 acres of land in Kansas	87,000.00	
Total deductions		207,000.00
Balance		643,000.00

For the five years prior to 1846 the average number of Indians west of the Mississippi, as shown by the Court of Claims in the case previously referred to, was 2,231; for the same period the total number in Michigan was 1,100, of which there was an average of 269 who were not entitled to share in the proceeds of the sale of lands under the treaty of 1846, they having received lands in Michigan under the supplemental article to the treaty of 1833. The figures are established by the eighth and ninth findings of the said court. Using the figures already determined as representing the number of the tribe in Canada and Wisconsin, the following table has been constructed, showing the total number of claimants who might have shared in the cash payment of $120,000 made under the treaty of 1846:

Average number of the tribe west of the Mississippi	2,231
Number in Michigan	831
Approximate number in Canada	518
Average number of the Wisconsin band in Wisconsin and Canada	1,925
Total number of claimants	5,505

Fractional part due the Wisconsin band, assuming that all members of the tribe should share equally, 1925/5505 of $120,000, which amounts to $41,961.85.

STATEMENT No. 3.

By Article VII of the treaty of June 17, 1846, the balance of the purchase price of $643,000 which remained after the deductions stated was to be held in trust by the United States, and to draw interest at 5 per cent annually, commencing at the expiration of one year after the removal of said Indians and continuing for thirty years and until the nation was reduced below 1,000 souls. Interest on that sum, amounting to $32,150, was first appropriated by the act approved July 29, 1848, and the same amount was yearly appropriated up to and including 1868, after which the trust principal was reduced by the shares of the citizens being withdrawn in accordance with the provisions of the treaty of 1861, until, in 1875, it only amounted to $230,064.20 and the interest to $11,503.21.

In determining the number of claimants entitled to share in this fund recourse is again had to the decision of the Court of Claims (eighth, tenth, and eleventh findings of fact) and the other sources of information mentioned, from which the following compilation is made:

Average number of the tribe west from 1846 to 1872	2,640
Average number of the tribe west from 1872 to 1907 (census under treaty of 1861)	2,180
	4,820
Mean average west from 1846 to 1907	2,410
Numbers in Michigan, exclusive of average of 291 who received lands there	809
Approximate number in Canada from Michigan	518
Average number of Wisconsin band in Wisconsin and Canada	1,925
Total number of possible claimants	5,662

Fractional part of said interest, due the Wisconsin band, assuming that all share equally, 1925/5662.

The total interest accrued and estimated on the said balance of $643,000 is shown by periods as follows:

Annual interest	$32,150.00
Amount due nation from 1848 to 1863 inclusive (16 years)	514,400.00
Amount due the Wisconsin band	174,888.73
Amount calculated for nation from 1864 to 1907 (44 years)	1,414,600.00
Amount due the Wisconsin band	480,943.93

STATEMENT No. 4.

Share of the Wisconsin band of Pottawatomies in the proceeds of the sale of surplus lands and interest on deferred payments.

Under Article V of the treaty of 1861 (12 Stat. L., 1191) the privilege was granted the Leavenworth, Pawnee and Western Railroad Company to purchase the surplus lands of the Pottawatomies (acquired by the treaty of 1846 for the retained purchase price of $87,000) at $1.25 per acre. Article 2 of the agreement of February 27, 1867 (15 Stat. L., 531), sets forth that the Leavenworth, Pawnee and Western Railroad Company, having failed to purchase the lands as provided by the agreement of 1861, the Atchison, Topeka and Santa Fe Railway Company may purchase said lands at $1 per acre; the amount of such purchase money to be paid within five years from date of purchase, with interest at the rate of 6 per cent per annum on deferred payments. Article 2 of the 1867 agreement provided that John F. Deils, John Shoemaker, and M. Gillaud should have the right to purchase in a compact body 1,013.54 acres of the unallotted lands at $1 per acre. These parties actually purchased and paid for 1,014.62
11 acres. The proceeds from the sale of the lands were divided according to the treaty of 1861 among the 2,180 members of the tribe, whose numbers were ascertained by the census taken, as required by said treaty. No other claimants shared. The proportion due the Wisconsin

band is estimated from the following table, using the figures as previously stated:

Number in Kansas	2,180
Number in Michigan	809
Approximate number in Canada from Michigan	518
Average number of the Wisconsin band in Wisconsin and Canada	1,925
Total number of possible claimants	5,432

Fractional part due the Wisconsin band, 1925/5432.

The following is a statement of the land account under the treaty of 1867 (15 Stat. L., 531):

Interest paid by the Atchison, Topeka and Santa Fe Railway	$101,630.05
Amount paid for land by Deil, Shoemaker, and Gillaud	1,014.62
Amount paid by the Atchison, Topeka and Santa Fe Railway	338,766.82
Total	441,411.49

Proportionate share of the Wisconsin band, $156,427.43.

STATEMENT No. 5.

Showing the number of acres allotted and held in common under the treaty of 1861, valued at $1 per acre.

Article 4 of the treaty of June 17, 1846 (9 Stat. L., 1853), provided for the purchase of 576,000 acres of land, which was to form the new reservation for the Pottawatomies in Kansas. Under the provisions of the treaty part of this land was to be allotted in severalty to those members who should afterwards become citizens, and part was to be set aside in portion equal to the amount given to those in severalty, to be held in common by the non-citizens, and the remainder of the land was to be sold at $1 per acre to the Atchison, Topeka and Santa Fe Railway Company, except the 1,014.62 acres sold to Deil, Shoemaker, and Gillaud. The total amount sold was 339,781.44 acres, showing that the number of acres allotted in sev-

eralty and the number to be held in common aggregated 236,218.56 acres. Placing the same value on this allotted land as was paid for the surplusage, it would be worth $236,218.56. The Wisconsin Pottawatomies not having been allotted lands elsewhere, would have been entitled to a share of the 576,000 acres in Kansas had they removed there. If they are entitled to share in the proceeds of the surplus lands, then each one would be entitled to share equally with the Kansas members of the tribe in the lands allotted and held in common, either by receiving their proper allotments or an equivalent in cash. As allotments, however, were to be based on the status of the several members of the tribe, which status has not been determined for the Wisconsin band, it is impracticable to determine the number of acres that they should have received in allotments; hence an estimate of the cash value of the proportionate shares of the entire Wisconsin band is submitted, taking the membership of the tribe as compiled for statement No. 4:

Acres	236,218.56
Value	$236,218.56

12 The fractional part of the value of this land to which the Wisconsin band would have been entitled had they emigrated with their brethren is 1925/5432, which amounts to $84,065.71. It is presumed that the use of lands in Wisconsin and Michigan is sufficient consideration to form an equitable set-off against any claim for interest that might otherwise be held to have accrued on this item.

STATEMENT No. 6.

Beginning with the fiscal year 1869, certain portions of the principal of $643,000 remaining from the purchase price of the lands ceded to the United States under the treaty of June 17, 1846 (9 Stat. L., 853), were paid from time to time to the members of the tribe in Kansas, who

elected to receive their allotments in severalty, until in 1875 it was reduced, as previously stated, to $230,064.20, of which amount $148,844.51 was paid to the Pottawatomies in Kansas in the first quarter of the fiscal year 1908, in accordance with the act of March 1, 1907 (34 Stat. L., 1031). The balance of $81,219.69, being the shares of certain minors and incompetents, was retained in the Treasury of the United States. Although the act of March 1, 1907, specifically provides that the balance of $230,064.20, appropriated by it, shall be paid to the "members of the Pottamatomie tribe of Indians in Kansas," it is believed that the equitable right of the members of the Wisconsin band to share in the payment of this balance is as great as their right to share in the other portion of the $643,000 principal; hence this statement is made to include the entire amount of said principal.

The number of claimants is taken in conformity with the estimate made in statement No. 4, showing the fractional part due the Wisconsin band to be 1925/5432.

1925/5432 of $643,000 equals $227,866.10.

RECAPITULATION.

Proportionate shares of the Wisconsin Pottawatomies.

Statement.	1838 to 1863.	1864 to 1907.	Total.
No. 1	$484,156.75	$314,255.37	$798,412.12
No. 2	.....	.....	41,961.85
No. 3	* 174,888.73	480,943.93	655,832.66
No. 4	.....	.....	156,427.43
No. 5	.....	.....	84,065.71
No. 6	.....	.....	227,866.10
Total	659.045.48	795,199.30	1,964,565.87

* From 1848 to 1863.

* * * *

1

58TH CONGRESS, 3d Session.

REPORT No. 4082.

HOUSE OF REPRESENTATIVES

Intervenor's Ex. L. 82. Tr. 553

CLAIMS OF THE POTAWATOMI INDIANS.

JANUARY 30, 1905.

Referred to the House Calendar and ordered to be printed.

REPORT

[To accompany H. R. 15897.]

The Committee on Indians Affairs, to whom was referred the bill (H. R. 15897) to provide for the investigation of the claims of the Potawatomi Indians of Wisconsin for their proportionate shares of the annuities, interest on trust funds, and other moneys heretofore paid or expended for the tribe to which they belong, in which payments the claimant Indians have not shared, having had the same under consideration, beg leave to submit the following report and recommend that the bill be passed with the following amendment:

Strike out all after the word "Wisconsin" in line 13, page 2.

This amendment strikes out the appropriation of money contained in the bill as introduced, as in the opinion of the committee the regular force of special agents and inspectors can perform this service without entailing extra expense on the part of the Department in obtaining the desired information.

The Potawatomi Indians of Wisconsin belong to what was originally known as the United Nation of Chippewa, Ottawa, and Potawatomie Indians, which, prior to 1816,

occupied unceded Indian country on both sides of Lake Michigan and to the south of that lake, extending down into the States of Indiana and Illinois. Cessions of portions of that country, to the south of Lake Michigan in Indiana and Illinois, were made by treaties of 1816 and 1832 (7 Stat. L., 146, 378, and 399), which cessions served to separate territorially those of the United Nation residing on the east side of said lake from those residing on the west side thereof.

This was their situation in 1833, when, by a treaty of September 26 and 27 of that year (7 Stat. L., 431), concluded at Chicago on the first-named date with the chiefs and headmen of those on the west side of Lake Michigan, and on the last-named date with those on the east side of said lake, said Indians ceded to the United States all of their lands on the west side of said lake, and all on the east side thereof south of Grand River, the consideration being certain money payments, and a new reservation west of the Mississippi River, to contain not less than 5,000,000 acres, to which said Indians were to remove within three years at the expense of the United States, and to be subsisted for one year; after said three years the treaty provided that "the whole amount of the annuities shall be paid at their location west of the Mississippi." (Ibid., art. 4.)

2

* * * * *

The new reservation was selected on the Missouri River, where Council Bluffs, Iowa, now stands. The removal of the Indians to that reservation soon began, but it was the work of years and much effort, as many of the individuals insisted that their chiefs and headmen had not the authority to obligate them to remove from their country about Lake Michigan, to which they were strongly attached.

In 1846, when the removal had not been completed, those then on the new reservation made a treaty stipulat-

ing that the said United Nation should thereafter be known as a nation, "to be called the Potawatomi Nation." By that same treaty the new reservation was exchanged for one in what is now the State of Kansas.

At the date that treaty was concluded there remained in Wisconsin a considerable number of said Indians who had never removed. In the annual report of the Commissioner of Indian Affairs the numbers of those remaining in Wisconsin belonging to the tribe removed to west of the Mississippi River are stated as follows:

About 600 Potawatomies strolling through Wisconsin belong to Kansas Territory. (Annual Report Commissioner of Indian Affairs, 1856, p. 41.)

The troublesome situation and distressed condition of these wandering Indians in Wisconsin was brought to the attention of Congress, and on June 25, 1864, the following provision of law was enacted:

To enable the Secretary of the Interior to take charge of certain stray bands of Winnebago and Potawatomi Indians, now in the State of Wisconsin, with a view to prevent any further depredations by them upon the citizens of that State, and for provisions and subsistence, ten thousand dollars: *Provided*, That the proportion of annuities to which said stray bands of Potawatomies and Winnebagoes would be entitled if they were settled on their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling or subsisting them on any other reservation which may hereafter be provided for them. (13 Stat. L., 172.)

By the act of March 3, 1865, $10,000 was provided for the same purpose (13 Stat. L., 560). By the act of July 26, 1866, $5,000 was provided for the same purpose (14

Stat. L., 265). The act of March 2, 1867, provided a sum for the same purpose, and contains this additional clause:

For salary of a special agent to take charge of Winnebago and Pottawatomie Indians now in the State of Wisconsin, one thousand five hundred dollars. (14 Stat. L., 514.)

These provisions were repeated in the act of July 27, 1868 (15 Stat. L., 221), and in the act of April 10, 1869 (16 Stat. L., 40). By the act of July 15, 1870 (16 Stat. L., 359), provision was made for the expenses of removal of said Indians to the tribes to which they belonged.

* * * *

3

Your committee finds that no home or reservation for said Indians has ever been provided for them in the State of Wisconsin, where they have continued to remain, earning their own support by trapping, hunting, laboring in lumber camps, and in other ways; that they are represented to be in destitute condition and their children growing up in ignorance. It is further ascertained by your committee that the Department of the Interior has failed to observe and comply with the law of 1864, requiring that the portion of the annuities to which said stray band of Pottawatomie Indians are entitled to be retained in the Treasury to their credit, etc.

The same situation of failure was found as to the stray bands of Winnebagoes, which has heretofore been brought to the attention of Congress, resulting in the passage of the act of January 18, 1881 (21 Stat. L., 315), requiring the adjustment of their claim for back annuities, by recouping the money necessary therefore, from that portion of the tribe that had removed west, and paying it to those residing in Wisconsin.

Your committee finds that the claims of the Potawatomi Indians of Wisconsin is in every respect similar to that

of the claim of the Winnebagoes of Wisconsin, adjusted under the law last mentioned. They set out in their memorial to Congress on the matter (Senate Doc. No. 185, 75th Cong., 2d sess., p. 13) that the tribal annuities for the twenty-six years from 1838 to 1863, inclusive, amounted to the sum of $1,806,650; for the thirty-nine years from 1864 to 1902, to $2,123,550; making a total for those periods of $3,930,200.

They further claim that the whole tribe to which they belong numbers 3,803, including the claimant Indians, whose number is stated to be 700; and they claim that they are entitled to their back annuities on the basis of their numbers.

Your committee is satisfied that, under the provisions of the treaties and laws on the subject, there is merit in the claims of these Potawatomi Indians of Wisconsin. The just, fair, and reasonable measure of such merit can only be ascertained and determined in the light of facts, figures, and other data to be gathered by a careful and thorough investigation of the whole subject, the taking of a census of the claimant Indians, and a full and clear report to Congress.

The bill H. R. 15897, as reported with amendment, provides merely for an investigation and report, and your committee recommend that it be passed as amended.

SUPREME
Office Supreme Court, U.S.
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OCT 4 1958
JAMES R. BROWNING, Clerk

BRIEF IN OPPOSITION TO CERTIORARI

No. 627

IN THE

Supreme Court of the United States

October Term, 1958

HANNAHVILLE INDIAN COMMUNITY, ET AL.,
Petitioners

v.

THE PRAIRIE BAND OF POTAWATOMI INDIANS, ET AL.,
THE CITIZEN BAND OF POTAWATOMI INDIANS, ET AL.,
Respondents

and

THE UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Claims. Brief of Respondents in Opposition

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v.

THE PRAIRIE BAND OF POTAWATOMI INDIANS, ET AL.,
THE CITIZEN BAND OF POTAWATOMI INDIANS, ET AL.,
Respondents

and

THE UNITED STATES OF AMERICA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I.

OPINIONS BELOW

The opinion of the Court below is dated July 16, 1958, and reported as *Prairie Band of Potawatomi Indians et al.*, v. *United States, et al.*, in 165 Fed. Supp. 139 to 154, inclusive. At this writing this opinion has not been printed in a volume common to the reports of the Court of Claims. This opinion was written by Mr. Justice Reed (retired from this Court) but the usual statement as to the writer of the opinion was omitted from the copy of the opinion printed by the petitioners in their appendix. (1-A) The Court of Claims opinion was unanimous.

The Indian Claims Commission wrote both Findings of Fact and an opinion, dated September 19, 1956, (4 Indian Claims Commission, 515, 539). As this Court may be aware, the findings of fact and opinions of this Commission are mimeographed and not printed. A copy of the Commission's *opinion* has been printed in the appendix of petitioner's brief (A-25-47A). The Findings of Fact by the Commission in this matter have not been printed by the petitioner. Counsel for respondents deem such findings of fact most material and a part of the opinion of the Commission. They have printed the said Findings of Fact in the appendix to this brief.

II.

JURISDICTION

The Indian Claims Commission entered Findings of Fact and an opinion dated September 19, 1956 (4 Indian Claims Commission 515, 539), sustaining the motion of the respondents to dismiss the intervening petition of the petitioners because of the failure of the petitioners to establish that they had any interest in the principal case, in which, on the same day, the Commission filed Findings of Fact and an opinion, (4 Indian Claims Commission). Petitioners filed a motion for rehearing of the allowance of the motion dismissing their intervening petition. Upon the denial of said motion, petitioners filed an appeal to the United States Court of Claims under Section 20 (b) of the Indian Claims Commission Act of 1946. The Court of Claims decided the case adversely to the petitioners in this opinion entered July 16, 1958, which has been reported as above stated. Petitioners filed a motion for rehearing shortly before the lower Court adjourned for the summer months. The motion was denied on October 8, 1958, after the judges of the Court returned. The filing of this petition for certiorari followed.

In a proper Indian case, this Court certainly has discretionary jurisdiction to grant or deny certiorari under 28 U. S. C. 1255, and Section 20(c) of the Act of August 13, 1946, 60 Stat. 1049.

Respondents contend that this case is not a proper case in which to grant certiorari.

III.

QUESTIONS PRESENTED

The Indian Claims Commission made Findings of Fact, sustained by the Court of Claims, to the effect that the petitioners were not as a matter of historic fact, tribal custom or Federal law, members of, or occupants of the lands of the Potawatomi Nation which in 1846 made a treaty ceding such lands to the United States (9 Stat. 853). The question is whether subsequent Congressional legislation appropriating funds for the petitioners' benefit must be construed as making them a part of the Potawatomi Nation, and entitled to share with the acknowledged bands of that Nation the recovery of compensation for the lands ceded in 1846.

No question is involved as to the power of the Court below, or the Indian Claims Commission to "modify" (Pet. p. 5) an Act of Congress. The appropriations made from general funds in the Treasury (not from tribal funds) were, so far as appears, expended by the Secretary of the Interior, as intended, for the petitioners, or for their benefit.

IV.

STATUTES INVOLVED

The statute primarily involved is the Act of August 13, 1946, 60 Stat. 1049, generally known as the Indian Claims Commission Act, particularly Section 20 thereof.

Also, there are involved certain extracts from statutes enacted by the Congress from time to time during the period of 1906 to 1928 which are printed in the appendix to this brief. (App. 12-17)

V.

STATEMENT

The Potawatomi Indians all originally lived east of the Mississippi River, organized in different autonomous groups and occupying various tracts of land in what we now know as the States of Ohio, Indiana, Michigan, Illinois and Wisconsin. (165 Fed. Supp., pg 143). Westward removal of the majority of the Potawatomi Indians was effected in large measure by two treaties. By a treaty made in 1833 a tract in South Western Iowa was granted to Potawatomi Indians and a few Chippewa and Ottawa Indians, referred to as the "United Nation of Chippewa, Ottawa and Potawatomie Indians" (7 Stat. 439). By a second treaty made in 1837 a tract of land in eastern Kansas, in the Osage River area, was granted to "The Pottawatomies of Indiana". Both tracts were reconveyed to the United States by a treaty made in 1846, which treaty also consolidated the Indians on both tracts, formerly autonomous Potawatomi groups or bands of said Indians into the "Potowatomi Nation" of Indians. None of the petitioners' ancestors were included among the groups consolidated. This 1846 treaty also provided that the consolidated bands, forming the Potowatomie Nation were to be removed to the Kaw River Valley in Kansas and they were so removed.

The Potowatomie Nation of Indians later became divided into the Citizen Band and Prairie Band of Potawatomie Indians. The Prairie Band was allowed to retain a small reservation of Kaw River land to be held in common. The Citizen Band received its share of the Kaw River land in severalty. The balance of the Kaw River Land was sold to one of the western railroad companies

and the proceeds were divided only among the members of the said Prairie and Citizen bands of Indians, respondents here.

Petitioners here are descendants of individual Indians who remained east of the Mississippi, some with Government consent and some without such consent. Some had formerly been connected with bands consolidated under the 1846 treaty, but none of them lived on the western lands.

Respondent brought this suit under the Act of August 13, 1946 to recover adequate compensation for the lands ceded by the Potawatomi Nation of Indians under the treaty of 1846. Petitioners intervened, with leave of the Indian Claims Commission. Following a trial on the merits, the Commission made Findings of Fact and wrote an able opinion. The Commission then dismissed the intervening petition. A motion was filed by the petitioners for a rehearing and the Commission denied the motion.

The petitioners then appealed to the United States Court of Claims and that court has affirmed the findings of fact and opinion of the Indian Claims Commission. Petitioners filed a motion for rehearing and the motion was denied.

The opinions of the Court of Claims and of the Indian Claims Commission are both such that counsel for respondents are unable to improve on their statements of the case. The opinion written by Mr. Justice Reed, particularly, stated the contentions of the petitioners and very clearly and ably answered the same.

VI.

ARGUMENT

1.

There is no conflict of decision

The petitioners have offered no citations in support of their assertion that "there is a conflict of decision which this Court should settle" (Pet. p. 32). Actually, the decision of the Court below makes it plain that both that Court and the Commission are in accord with all the decisions of this Court, going back to the *Cherokee Trust Funds* case, 117 U. S. 308. Moreover, as pointed out by the court below, a similar claim to that of the petitioners was long ago rejected by the Court of Claims in *Potawatomie Indians* v. *United States*, 27 C. Cls. 403, aff'd sub. nom. *Pam-to-pee* v. *United States*, 148 U. S. 691.

The principle of these decisions has been since consistently followed. This principle was stated and applied by the Court and Commission below (165 Fed. Supp. 139, 147; see Pet. p. 13-A):

> "Since it was only members of the tribe who were entitled to the use and benefit of the tribal property, land or annuities, membership in the tribe is the touchstone to the right of individuals or groups to participate."

citing *Halbert* v. *United States*, 283 U. S. 753; *Oakes* v. *United States*, 172 Fed. 307.

On this issue we know of no conflict of decisions between the opinions and judgments of either the Commission or the Court below, and the opinions and judgments of this Court.

2.

The opinion and judgment of the Court below are clearly correct.

The petitioners have cited no cases which hold, or even by implication suggest, that the Court below may be in

error. The petitioners' main argument is that the Congress of the United States has recognized the present day so-called Wisconsin Band of Indians as entitled to share in all the assets, including recoveries of the Potawatomi Nation for western lands under the Indian Claims Commission Act. Both the Court below and the Indian Claims Commission carefully examined this contention and found it to be entirely without merit.

The appropriations made by the several statutes between 1906 and 1928 relied upon do not in terms, or by implication, determine that the Wisconsin Potawatomi Indians have, or should be given, any recognized status as members of the Potawatomi Nation which moved west of the Mississippi River, or to share with the members of such Nation or their successors in recoveries under the Indian Claims Commission Act. The Court below determined that the evidence supported:

> "* * * the Commission's final conclusion that the appellants [petitioners here] had dissolved 'their connections and their rights to share' in the proceeds of the Western lands before the treaty of Council Bluffs and Osage River." (165 Fed. Supp. 153)

Petitioners quote from a report of the Secretary of the Interior which they assert shows a determination by him of their rights (Pet. p. 19). The quotations omit significant phrases! The Secretary was discussing, and by direction of Congress reporting, on what would have been "due" the so-called Wisconsin Band "assuming that all members of the Tribe should share equally" (Pet. p. 90-A). With respect to lands west of the Mississippi, the report discusses what the alleged Wisconsin Potawatomi "would have been entitled to . . . had they removed there" (Pet. p. 94-A) or "had they emigrated with their brethren" (ibid).

The Court below specifically agreed with the Commission that as to the making of these appropriations to be

used by the Secretary of the Interior, as above stated, for the benefit of the petitioners:

> "We conclude that the Indian Claims Commission correctly held that these appropriations were not and were not intended to be a recognition of a right in the non-emigrant Wisconsin Indians to share in the proceeds of the Western property." (165 Fed. Supp. 146)

It has been stated in many cases in this Court, too numerous to mention, that this Court does not sit as a court for the correction of error.

The scope of judicial review by this Court of findings of fact and opinions of the United States Court of Claims in Indian cases is stated in Section 20(c) of the Indian Claims Commission Act, approved August 13, 1946, as follows:

> "*Determination of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States* in the manner prescribed by Section 3 of the act of February 13, 1925 (43 Stat. 939; 28 USC sec. 288[1] as amended." (Italics supplied)

There is thus no provision for the review of the facts by the Supreme Court of the United States in Indian cases arising under the Indian Claims Commission Act of 1946. A limited review of the facts in Indian cases is vested in the United States Court of Claims, in pertinent part, by Section 20(b) of the Indian Claims Commission Act of August 13, 1946, as follows:

> "At any time within three months from the date of filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims,

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[1] By revisions of the Federal Code, this Section 288 of Section 28 is now Section 1255 U. S. Code

which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event, they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section."

Mr. Justice Reed, in this case, was quite careful to point out in his opinion dated July 16, 1958, reported in 165 Fed. Supp. 139, at page 153, that:

"Our review of this record leads to the conclusion reached by the Commission. We think the Commission's findings of fact, material to the conclusions reached by us as to the claims of appellant, are supported by substantial evidence in the record as a whole in accordance with this Court's interpretation of the Indian Claims Commission Act in *Osage Nation of Indians* v. *United States*, 119 Ct. Cls., 592, 602 and support the Commission's final conclusion that the appellants had dissolved 'their connections and their rights to share' in the proceeds of the Western Lands before the Treaty of Council Bluffs and Osage River."

"The judgment of the Indian Claims Commission dismissing the petition for intervention is affirmed."

There is not involved here any important question of Federal Law. The assertions of the petitioners to the contrary have been made notwithstanding the unanimous

Findings of Fact and the unanimous opinion of the three man Indian Claims Commission, which are both dated September 19, 1956. Also, the said Commission unanimously denied petitioners' motion for a rehearing in the case.

The assertions of petitioners are also in the face of the unanimous opinion and judgment of the Court of Claims, a retired member of this Court writing the opinion unanimously concurred in by the sitting judges of the Court below. A motion for a further hearing by the said court was denied on October 8, 1958.

Thus three members of the Indian Claims Commission and Mr. Justice Reed and three sitting members of the Court of Claims, or a total of seven members of the Commission and the Court below, have decided the issues in the case which petitioners now assert were erroneously decided!

Counsel for the respondents are satisfied that the learned Findings of Fact prepared by the Indian Claims Commission and its opinion as well as the learned opinion of the Court below constitute a complete answer to the petition for certiorari.

Instead of an important question of Federal law being involved, all that is involved is whether the petitioners are entitled under uncontested facts to a share of any recovery the respondents may collect for the cession by the Potawatomi Nation of Indians in 1846 of their land in southwestern Iowa and in eastern Kansas in the Osage River area! The Commission and the Court below have answered in the negative and we believe the Court below to be entirely correct.

Conclusion

Respondents believe that the opinion and judgment of the Court of Claims are entirely correct in affirming the

Findings of Fact and Opinion of the Indian Claims Commission. The petition for certiorari should be denied for the reason that it can not be properly granted in view of the terms of Section 20 (c) of the Indian Claims Commission Act of 1946 and the correctness of the opinion and judgment of the Court below.

Respectfully submitted,

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APPENDIX I

Act of June 21, 1906, 34 Stat. 380:

> "That the Secretary of the Interior be, and he is hereby, directed to cause an investigation to be made of the claims of the Pottawatomie Indians of Wisconsin, as set forth in their memorial to Congress printed in Senate Document Numbered One Hundred and Eighty-five in Fifty-Seventh Congress, Second Session, and to be reported thereon to Congress at the beginning of the last session thereof, showing on the best information now obtainable what number of said Indians continued to reside in the State of Wisconsin after the Treaty of September 26, 1833, their proportionate share of the annuities, trust funds, and other moneys paid to or expended for the tribe to which they belong, in which the claimant Indians have not shared, the amount of such moneys retained in the Treasury of the United States to the credit of the claimant Indians as directed by the provision of the Act of Congress approved June 25, 1864; if none have been so retained the amount that should have been annually so retained under said law, showing also what disposition has been made of the annuities, trust funds, and other moneys of said tribe, with the amounts and the status of any now remaining to their credit in the Treasury or otherwise. He will also cause an enrollment to be made of said Pottawatomie Indians."

Act of June 30, 1913, 38 Stat. 102:

> "For the portion of allotments for the individual members of that portion of the Wisconsin Band of Pottawatomie Indians now residing in the States of Wisconsin and Michigan $150,000 said sum to be reimbursed to the United States out of appropriation, when made, of $447,339, the said sum last named being the proportionate share of the said Indians in annuities and moneys of the Potawatomie Tribe, in which they have not shared, as set forth in House Document Eight Hundred and Thirty, Sixtieth Congress, First Session, and the Secretary of the In-

terior is hereby authorized to expend the said sum of $150,000 in the purchase of land within the States of Wisconsin and Michigan, the title of such land to be taken in trust by the Government for the use and benefit of said Indians, said land to be situated in organized school districts and to be purchased in bodies of not more than one section, which said bodies shall not adjoin each other: *Provided*, that the lands so purchased, except such part thereof as may be necessary for administrative purposes, shall be divided equitably among the Indians entitled thereto, and patents therefor shall be issued in accordance with the general allotment laws of the United States: *Provided further*, That The Secretary of the Interior may, in his discretion, withhold allotments from any Indian or Indians belonging to this Band who, owing to advanced age or other infirmities, are deemed by him incapable of making beneficial use thereof, and in lieu of similar allotments to Indians falling within this class tentative allotments of land may be made to such Indians for occupancy and use during the remainder of their natural lifetime."

Act of August 1, 1914 (38 Stat. 607)

"The money appropriated in section twenty-four of the Indian Appropriation Act of June thirtieth, nineteen hundred and thirteen (Public Numbered four), for the purchase of allotments for the individual members of that portion of the Wisconsin Band of Pottawatomie Indians now residing in the States of Wisconsin and Michigan, is hereby reappropriated and made available for the purpose for which appropriated and shall remain available until expended."

Act of May 18, 1916 (39 Stat. 156-157)

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under the provisions of the Act of Congress approved June thirteenth, nineteen hun-

dred and thirteen, $100,000, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proprotionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared, as set forth in House Document Numbered Eight Hundred and thirty (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $100,000 in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: *Provided*, That in order to train said Indians in the use and handling of money, not exceeding $25,000 of the above appropriation may be paid to them per capita, or be deposited to their credit subject to exppenditure in such manner and under such rules and regulations as the Secretary of the Interior may prescribe."

Act of March 2, 1917 (38 Stat. 991)

"For the support and civilization of these portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen, $100,000, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared, as set forth in House Document Numbered Eight Hundred and thirty (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $100,000 in the clearing of land and the purchase of homes, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: *Provided*, That in order to train said Indians in the use and handling

of money, not exceeding $25,000 of the above appropriation may be paid to them per capita, or be deposited to their credit subject to expenditure in such manner and under such rules and regulations as the Secretary of the Interior may prescribe."

Act of May 25, 1918 (30 Stat. 589)

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the land purchased for them under the provisions of the Act of Congress approved June thirtieth, nineteen hundred and thirteen, $75,000, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared as set forth in House Document Numbered Eight hundred and thirty (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to expend the said sum of $$75,000, in the clearing of land and the purchase of houses, building material, seed, animals, machinery, tools, implements, and other equipment and supplies necessary to enable said Indians to become self-supporting: *Provided*, That from the sum herein appropriated for said Pottawatomie Indians the Secretary of the Interior, is hereby authorized to pay to the legal representatives of R. V. Belt (Mrs. Jena Belt and William O. Belt), such sum, not exceeding $25,000, as he, after a proper hearing, may fix as compensation justly and equitably due the said Belt and associates on a quantum meruit for their services in recovering for the said Pottawatomie Indians the annuities withheld from them, under contract with representatives of said Indians approved by the Commissioner of Indian Affairs November first, nineteen hundred and two."

Act of June 30, 1919 (41 Stat. 29)

"For the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians

residing in the States of Wisconsin and Michigan, and to aid said Indians in establishing homes on the lands purchased for them under the provisions of the Act of Congress approved June 30, 1913, $15,500, or so much thereof as may be necessary, said sum to be reimbursed to the United States out of the appropriation, when made, of the principal due as the proportionate share of said Indians in annuities and moneys of the Pottawatomie Tribe in which they have not shared as set forth in House Document Numbered 830 (Sixtieth Congress, first session), and the Secretary of the Interior is hereby authorized to make per capita payment of $40 to said Indians out of said funds: *Provided*, That no further expenditures be authorized or made under appropriations heretofore enacted making provisions for the purchase of land and the clearing of same for said Potawatomie Indians: *Provided further*, That from the sums heretofore appropriated for said Pottawatomie Indians the Secretary of the Treasury is hereby authorized and directed to pay to Erik O. Morstad, of Laona, Wisconsin, in person and in full satisfaction for services rendered, the sum of $2,000."

Act of May 29, 1928 (45 Stat. 901)

"Payment to Pottawatomie Indians of Wisconsin and Michigan: For the Wisconsin Pottawatomie Indians of Wisconsin and Michigan, $6,839, this sum being the unappropriated balance found due said Indians under the treaty of September 27, 1833 (Seventh Statutes at Large, page 442), and the Act of June 25, 1864 (Thirteenth Statutes at Large, page 172); and the unexpended balances of appropriations made for the purpose by the Act of May 18, 1916 (Thirty-ninth Statutes at Large, page 156) May 25, 1918 (Fortieth Statutes at Large, page 589), and June 30, 1919 (Forty-first Statutes at Large, page 29), aggregating $37,044.55, together with the unexpended balance of $4,347.73 of the appropriation for the purchase of land for said Indians contained in the Act of June 30, 1913 (Thirty-eighth Statutes at Large, page 102), which have been carried to the surplus fund of the Treasury, are hereby reappro-

priated; and the foregoing amounts aggregating $48,231.28 shall remain available until June 30, 1929, and be subject to expenditure for the benefit of said Indians, or payment to them, in the discretion of the Secretary of the Interior, as authorized by the Act of February 29, 1928."

Act of February 14, 1920 (41 Stat. 432)

"The unexpended balance of the appropriation for the fiscal year 1918, approximating $55,057.37, is hereby reappropriated and made available until expended for the support and civilization of those portions of the Wisconsin Band of Pottawatomie Indians residing in the States of Wisconsin and Michigan: *Provided, however,* That the above-mentioned sum shall be used only for the purposes set forth in section 25 of the Act approved May 18, 1916 (Thirty-ninth Statutes at Large, pages 156 and 157), and section 24 of the Act approved March 2, 1917 (Thirty-ninth Statutes at Large, page 991)."

APPENDIX II

BEFORE THE

Indian Claims Commission

Docket No. 15-J

THE PRAIRIE BAND OF POTAWATOMI INDIANS, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Docket No. 71-A

THE CITIZEN BAND OF POTAWATOMI INDIANS, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Defendant.

HANNAHVILLE INDIAN COMMUNITY, ET AL.,
Intervening Petitioners.

Decided: September 19, 1956

FINDINGS OF FACT RELATING TO MOTION TO DISMISS INTERVENING PETITION

The Commission makes the following findings of fact:

1. The claims presented in this suit involve questions of adequate compensation for two tracts of land. One, located in Iowa, was granted by treaty in 1833 to the "United Nation of Chippewa, Ottawa, and Potawatomie Indians" which by the same treaty ceded to the United States certain lands in Illinois and Wisconsin. This group, hereinafter referred to as the "United Nation", an entity comprising a dominant group of Potawatomi

Indians, with which Indians of Chippewa and Ottawa ancestry were affiliated, is further described and identified below in Findings 11-14.

The other tract, located on the Osage River in Kansas, was granted by treaty in 1837 to the "Potawatomies of Indiana", who are identified below in Findings 11, and 23-24.

EVIDENCE

See petitions, 71-A and 15-J; treaty of September 26, 1833, 7 Stat. 431; treaty of February 11, 1837, 7 Stat. 532; and treaty of June 5 and 17, 1846, 9 Stat. 853.

2. By a treaty with the United States made at Council Bluffs, Iowa, on June 5, 1846, and on the Osage River in Kansas on June 17, 1846, all the Indian bands on the two tracts were united to form the Potawatomi Nation and the Nation ceded the two tracts to the United States and removed as a unit to another tract, on the Kansas River in Kansas. The term "Potawatomi Nation" hereinafter refers to this entity.

Subsequently the Potawatomi Nation was divided into two bands: the Prairie Band of Potawatomi Indians, which is still located in Kansas on a reserve carved out of the Kansas River tract, and the other, the Citizen Band of Potawatomi Indians of Oklahoma, which, subsequent to 1867, removed to Oklahoma and is still located there. The Prairie Band and the Citizen Band have been recognized by the Government as successors of the Potawatomi Nation.

The Prairie Band is the petitioner in No. 15-J, and the Citizen Band is the petitioner in No. 71-A.

EVIDENCE

The division of the Potawatomi Nation into the Citizen Band and the Prairie Band followed the treaties of November 15, 1861, 12 Stat. 1191, and

February 27, 1867, 15 Stat. 531. That the Citizen and Prairie Bands are successors in interest of the Potawatomi Nation which moved to the Kansas River in Kansas has been conceded by the defendant in Docket Nos. 15-B and 111, consolidated for trial. In Docket Nos. 15-B and 111 see petitioners' findings 1-23, and defendant's brief, at page 2. This conclusion has been conceded in this case (Tr. 843) and is not disputed by any of the parties.

3. Both the Prairie Band and the Citizen Band are organized bands of American Indians having capacity to present claims under the Indian Claims Commission Act.

EVIDENCE

This is not in dispute. See citations under Finding 2.

4. The intervenors, two organized Indian communities, the Hannahville Indian Community located in northern Michigan and the Forest County Potawatomi Community located in northern Wisconsin, and six individual Indians joined with them, all assert an interest in the claims.

On of the individual intervenors, Elijah Petonquot, has not been identified. The other five have given testimony as follows:

Frank Wandahsego, Sr., a member of the Hannahville Indian Community, and Valentine Ritchie and Ike (Isaac) George, members of the Forest County Potawatomi Community, claim descent from Potawatomi Indians who in 1833 were members of the United Nation, but who did not move to Iowa with the United Nation. Michael Williams claims descent from members of the Pokagon Band, a group of Potawatomi Indians for whom special provision was made in the 1833 treaty. Albert Mackety claims descent from members of the band known as the Potawatomi of Huron.

EVIDENCE

See depositions of the intervenors, Int. Ex. I-96, I-97, I-98, I-99, I-106; testimony of Albert Mackety, Tr. 820-827; testimony of Michael Williams, Tr. 1112-

1113; and testimony of Harry Ritchie, Tr. 1182-1193. Harry Ritchie's testimony was endorsed by his brother, Valentine Ritchie, Tr. 1212.

5. The two communities referred to in Finding 4 have asserted no claims in their own right. The intervenors' claims are that they represent Indians whose ancestors were members of the Potawatomi Nation which owned the lands for which additional compensation is sought, and that they are entitled to participate in the suit and in any recovery. The evidence discloses that the intervenors are members of three distinct classes: (1) descendants of Potawatomi Indians who resided in Wisconsin in 1833 and who did not move westward; (2) descendants of members of the Pokagon band; (3) descendants of members of a band known as the Potawatomi of Huron.

The two communities referred to may include some members of the first class. The individual intervenors appear to include members of all three classes. The first class will be referred to hereinafter as the Wisconsin Indians. The second class will be referred to hereinafter as the Pokagon band. The third class will be referred to hereinafter as the Huron band.

EVIDENCE

The evidence relating to the Wisconsin Indians is set out below under Findings 49 to 58; that relating to the Pokagon band under Findings 40 to 48; and that relating to the Huron band under Findings 30 to 39.

6. In their various activities, including the holding and use of land and their dealings with respect thereto, the Potawatomi Indians during the period 1795 - 1833 were divided into various separate tribes or bands, residing in different areas, and acting politically as independent units. References to the Potawatomi tribe which appear to relate to all the Indians of Potawatomi ancestry, apply the word "tribe" in its ethnic connotation, as describing a group sharing a common name and language, and having

many customs in common. A "tribe" in the political sense was a group, generally occupying an unbroken geographical area, and having some central authority which may have acted either continuously or intermittently as the need arose. Treaties and land cessions, were made, and various political and economic activities were carried out, by the Potawatomi bands, which were "tribes" in the political sense of that word.

EVIDENCE

See testimony of Dr. Wallace, Tr. 933-934.

7. In the years 1795 to 1833, the Potawatomi Indians resided in two areas geographically separated from each other. One group, known as the Forest Potawatomi, resided in northern Wisconsin and northern Michigan, only as far south as L'Arbre Croche. The other group, at one time known as the "Mascouten" or "Prairie" Potawatomi, comprised the great majority of the Potawatomi Indians who had separated from the Forest Potawatomi in the course of an earlier southward migration, and resided between 1795 and 1833 around the southern part of Lake Michigan. Since the word "Prairie" was part of various names applied at various times to different groupings without regard necessarily to the characteristics of their contemporaneous or earlier modes of life, the Potawatomi Indians who resided around Lake Michigan in the period specified will be referred to as the southern Potawatomi.

The areas in which the southern Potawatomi resided, in terms of the states which were eventually formed from those areas were: southern Michigan, northwestern Ohio, northern Indiana, northern Illinois, and southern Wisconsin.

The Forest Potawatomi and the southern Potawatomi spoke different dialects of the Potawatomi language.

EVIDENCE

See testimony of Dr. Wallace, Tr. 936-942; Pet. (71-A) Ex. A-55, and Pet. (15-J Ex. 31 at page 16).

With respect to the specific areas inhabited by the various bands of the southern Potawatomi see also citations under Finding 11, below.

8. The Forest Potawatomi resided among a larger population of Indians,—other than Potawatomi,—and made no treaties with the United States in which the group was identified as an entity. Between the areas in which the Forest Potawatomi resided and the areas in which the southern Potawatomi resided lay the lands of the Menominee and Winnebago tribes.

The Forest Potawatomi had no political connections with the southern Potawatomi, and the two groups did not share any lands in common.

EVIDENCE

The Forest Potawatomi lived in an area also occupied by Chippewa, Ottawa, Menominee and Winnebago Indians (Tr. 979), and were not politically connected with the southern Potawatomi (Tr. 941).

Alanson Skinner's monograph on the Potawatomi, published in 1924 by the Public Museum of the City of Milwaukee, identifies this group as the Na'nosi or "Between" people, whose culture resembled that of the Ottawa, Ojibway [Chippewa] and Menominee more than that of the southern Potawatomi (Pet. (15-J) Ex. 31, p. 16). Another authority dates the separation of the Forest Potawatomi from the southern Potawatomi as of the time of the American Revolution (Def. Ex. 82, at p. 230).

An examination of Royce's maps of Michigan and Wisconsin discloses that the northern limits of cessions made or participated in by the bands which made up the southern Potawatomi (See Finding 11) were a line south of Saginaw in southeastern Michigan (No. 66, Royce's map Michigan 1, treaty of Nov. 17, 1807, 7 Stat. 105); the Grand River in southwestern Michigan (No. 117, Royce's map Michigan 1, treaty of Aug. 29, 1821, 7 Stat. 218); the southern tip of Lake Winnebago in southeastern Wisconsin (No. 187, Royce's map Wisconsin 1, treaty of Sept. 26, 1833, 7 Stat. 431); and the Wisconsin River in

southwestern Wisconsin (No. 147, Royce's map Wisconsin 1, treaty of July 29, 1829, 7 Stat. 320.).

Both the treaty of August 19, 1825 (7 Stat. 272), which fixed boundaries (See Articles 7, 8, and 9) and the 1833 treaty cited (See Article 1st) show the Winnebago and Menominee to be the northern neighbors of the Potawatomi in Wisconsin. Cessions to the United States of the lands in central and northern Michigan and Wisconsin were made as follows [The numbers identify tracts shown on Royce's maps, Michigan 1 and Wisconsin 1]:

Tract No.	Location	Ceded by	Treaty
111	Michigan	Chippewa	Sept. 24, 1819, 7 Stat. 203
205	Michigan	Ottawa and Chippewa	March 28, 1836, 7 Stat. 491
219	Michigan & Wisconsin	Menominee	Sept. 3, 1836, 7 Stat. 506
261	Michigan & Wisconsin	Chippewa	Oct. 4, 1842, 7 Stat. 591
158 & 160	Wisconsin	Menominee	Feb. 8, 1831, 7 Stat. 342
174	Wisconsin	Winnebago	Sept. 15, 1832, 7 Stat. 370
242	Wisconsin	Chippewa	July 29, 1837, 7 Stat. 536
271	Wisconsin	Menominee	Oct. 18, 1848, 9 Stat. 952

9. The southern Potawatomi shared a common language, culture, religion and social customs. Politically, however, the southern Potawatomi between 1795 and 1833 were divided into five organized units, which are referred to herein as bands. Each band acted as an entity, particularly with respect to transactions with the United States involving lands.

EVIDENCE

See testimony of Dr. Wallace, Tr. 942-944, 953-959, 965-967, 969-970. See also evidence cited under Finding 11.

10. The Potawatomi Indians were members of the particular bands with which they resided. By their own custom, Potawatomi Indians who made a permanent

change in residence from the lands of one band to the lands of another Potawatomi band, or of another ethnic tribe, made a corresponding change in membership and affiliation. In the same manner, Indians of other ethnic tribes became affiliated with particular Potawatomi bands by residence and adoption.

According to Potawatomi custom, descent from members of the band was a sufficient condition for membership if accompanied by continued residence with the band. The Potawatomi followed the general Algonkian custom of tracing descent in the paternal line. Thus, an Algonkian Indian born of a mixed marriage, would consider himself, and would be considered, as descended from the tribe or band of his father.

EVIDENCE

See testimony of Dr. Wallace, Tr. 935-938, 946-947, 950-952, 985.

Intervenor Michael Williams in his testimony identified Leopold Paul Pokagon, the chief whose followers became known as the Pokagon band as "not a Potawatomi by birth, nor blood; rather more Chippewa than Ottawa." (Tr. 1117). The witness referred to Pokagon's "naturalization as a Potawatomi." (Tr. 1118). The presence among the Potawatomi in Iowa of members of non-Potawatomi ancestry was noted by Government officials (Report of Agent Richard S. Elliot, July 24, 1845, Def. Ex. 51).

11. The five bands into which the southern Potawatomi were divided, and their general locale, were the following:

(1) The United Nation of Chippewa, Ottawa and Potawatimi, residing on the west side of Lake Michigan in Illinois and southern Wisconsin, and particularly on the Illinois, Milwaukee and Monitowoc Rivers and their tributaries. This band is hereinafter referred to as the "United Nation".

(2) The Potawatomi of the Prairie and Kankakee, residing south of Lake Michigan in the vicinity of the

Kankakee River and the Illinois-Indiana border. This band is hereinafter referred to as the Kankakee band.

(3) The Potawatomi of the Wabash, residing southeast of Lake Michigan, in northwestern Indiana, north of the Wabash River. This band is hereinafter referred to as the Wabash band.

(4) The Potawatomi of St. Joseph,—more commonly known from about 1830 on, as the Potawatomi of Indiana and Michigan,—residing in the general vicinity of the St. Joseph River on the east side of Lake Michigan, in southwestern Michigan and northern Indiana. This band is hereinafter referred to as the St. Joseph band.

(5) The Potawatomi of Huron, residing in the vicinity of the Huron and Raisin Rivers, in southeastern Michigan and northwestern Ohio. This band is hereinafter referred to as the Huron band.

The United Nation was located farthest west, and the Huron band farthest east, with the other three bands residing in the area between them.

EVIDENCE

See testimony of Dr. Wallace, Tr. 943-945, and Pet. (71-A) Ex. 38. Each of the five bands named made one or more treaties involving land in which the particular band was identified as the party to the treaty.

United Nation. The United Nation made the treaties of August 24, 1816, 7 Stat. 146; July 29, 1829, 7 Stat. 320; and September 26, 1833, 7 Stat. 431; by which contiguous tracts of land in Illinois and Wisconsin were ceded to the United States. The United Nation also participated with other tribes in two treaties relating to the same lands and adjoining lands of the other participating tribes. These were the treaties of August 19, 1825, 7 Stat. 272; and August 25, 1828, 7 Stat. 315. For a further discussion of these treaties, see Findings 13-14 and 17-18 and evidence cited, below.

Kankakee band. The treaty of October 20, 1832, 7 Stat. 378, was made with the Potawatmie Tribe of Indians of the Prairie and Kankakee. The land

ceded was located south of Lake Michigan on the Kankakee River in northeastern Illinois, No. 177 on Royce's map Illinois 1.

Wabash band. Six days after the Kankakee band treaty cited, on October 26, 1832, an adjoining tract in northwestern Indiana (Royce No. 180) was ceded by "the Pottawatomie Indians". (7 Stat. 394). However, the first appropriation act, approved March 2, 1833, for carrying out the Government's obligations under this treaty, was made for the benefit of "the Pattawatamies of the Wabash", (4 Stat. 636, 638).

St. Joseph band. On the day following the treaty with the Wabash band, a treaty was made with "the Potowatomies of the State of Indiana and Michigan Territory" for the cession of lands identified by Royce as No. 181 on his map of Indiana. (Treaty of October 27, 1832, 7 Stat. 399). The village of To-pen-ne-bee, identified as principal chief (see Article III) was located on the St. Joseph River in southwestern Michigan (see Royce's map, Michigan 1). Topenebee (spelled Thu-pe-ne-bu) signed the Greenville treaty for the "Putawatames of the River Saint Joseph." (See the treaty, 7 Stat. 49, at page 54).

Huron band. By the treaty of July 4, 1805 (Archives No. 44) lands in northern Ohio (Royce No. 53) were sold to two Connecticut land companies by various Indian groups including a so-called "Pottawatima Nation." Another treaty of the same date (7 Stat. 87) provided for payment of a share of the consideration to "such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof . . ." The treaty of November 17, 1807 (7 Stat. 105) by which lands in northwestern Ohio and southeastern Michigan (Royce No. 66) were ceded to the United States by a number of tribes, provided for payment of a permanent annuity to "such of the Pottawatamies, as now reside on the river Huron of lake Erie, the river Raisin, and in the vicinity of the said rivers." (See Art. H). Other evidence relating to the Huron band is set out below under Findings 30-39.

A number of treaties, involving lands in Ohio, Indiana and Michigan, do not identify particular Potawatomi groups but describe the treaty party as the Potawatomi "tribe" or "nation". It is unnecessary for a determination of the issues now before the Commission to identify the Indian groups which made these treaties. A full list of the treaties is set out in the appendix.

12. The United Nation was a band of Potawatomi Indians, with which individuals or small groups of Ottawa and Chippewa ancestry were affiliated or federated.

EVIDENCE

The organization of Potawatomi, Ottawa and Chippewa Indians in a unified tribe or band followed the tradition of the three ethnic groups once having been one people. (Pet. (71-A) Ex. 38). The Chippewa and Ottawa Indians in the United Nation were, politically, Potawatomi (Tr. 943). Governor Edwards of Illinois Territory referred to this group in 1815 as "Pottowotmies intermixed with band of Chippewas & Ottawas" (Pet. 71-A) Ex. 6) and in 1816 as "the confederated Tribes of Ottawas, Chippawas & Pottowotomies of the Illinois river, and western side of Lake Michigan" (Pet. (71-A) Ex. 7). The lands ceded by the United Nation in 1833 were described by variout Government officials, as "the land of these Pottawatomies" (Governor Porter of Michigan Territory (Pet. (71-A) Ex. 11)); "the Potawatimies . . . their territory" (Commissioner Herring (Pet. (71-A) Ex. 9)); "the Potawatamie Tribe . . . their lands" (Agent Owen (Pet. (71-A) Ex. 10)). The United Nation was under the jurisdiction of Indian Agent Thomas J. V. Owen at Chicago. The "Indians of his agency" were identified as "Pottawatamies" (Pet. (71-A) Ex. 11). The five treaties concluded between the United States and the United Nation described the latter variously as: "the united tribes of Ottawas, Chipawas, and Pottowotomees, residing on the Illinois and Melwakee rivers, and their waters, and on the southwestern parts of Lake Michigan" (1816, 7 Stat. 146); "the Ottawa, Chippewa, and Potawatomie tribe of the Illi-

nois" and the "Illinois Indians" (1825, 7 Stat. 272, Art. 9); "the United Tribes of Potawatamie, Chippewa and Ottawa Indians" (1828, 7 Stat. 315); the United Nations of Chippewa, Ottawa, and Potawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers" (1829, 7 Stat. 320); "the United Nation of Chippewa, Ottowa and Potawatamie Indians" (1833, 7 Stat. 431).

With reference to the 1816 treaty, sometimes referred to as the Edwardsville treaty, it was observed by a Government official in 1822 that "the Indians are in fact almost all Potawatomies" (Def. Ex. 78). A census of the Indians under the Chicago agency in 1833 showed 4,489 Potawatomi, 864 Ottawa and 453 Chippewa (Def. Ex. 54).

In August 1825, the United States assembled at Prairie du Chien a number of Indian tribes residing between Lake Michigan and the Missouri River. A treaty was concluded August 19, 1825, in which the boundaries of the lands of neighboring tribes were described, including lands of the United Nation in northeastern Illinois and southeastern Wisconsin west side of Lake Michigan.

EVIDENCE

Article 9 of the Prairie du Chien treaty (Aug. 19, 1825, 7 Stat. 272), which deals with the boundaries of the lands of the United Nation, refers back to the treaty of Aug. 24, 1816 (7 Stat. 146) which had settled a disputed land claim between the United States and the United Nation (see preamble to 1816 treaty). The 1816 and 1825 treaties establish the United Nation as an entity in the area shown on Royce's maps, Illinois 2 and Wisconsin 1, as Nos. 147, 148 and 187.

That the 1825 treaty was dealing with the boundaries of politically organized groups rather than with ethnic "tribes" is clear from the fact that the Chippewa "tribe," and the United Nation which included Chippewa Indians, were different and distinct parties to the treaty, and that the boundaries of the Chippewa "tribe" and of the United Nation were distinct and separated by the lands of other Indian

groups (see Articles 5, 6, 7, 8, and 9). Note that the United Nation was also referred to on occasions as "the Illinois Indians" (see Art. 9 of Prairie du Chien treaty, Aug. 19, 1825 (7 Stat. 272), and Def. Ex. 78).

14. In 1829, the United Nation ceded to the United States Royce Areas 147 and 148, referred to above in Finding 13. In 1833, the United Nation still held its interest in Royce Area 187, also referred to in Finding 13. Royce Area 187, bordering on Lake Michigan, in northeastern Illinois and southeastern Wisconsin, was estimated by United States officials to comprise five million acres.

EVIDENCE

See treaties of July 29, 1829, 7 Stat. 320, and Sept. 26, 1833, 7 Stat. 431.

15. In October 1832, three successive treaties were made respectively with the Kankakee, Wabash and St. Joseph bands whereby their respective lands south of Lake Michigan, in Illinois on the border of Indiana and in northern Indiana, were ceded to the United States. The treaties with the Wabash and St. Joseph bands provided for a number of small tracts including the Indian villages to be reserved to the village chiefs and the inhabitants of the villages.

EVIDENCE

See treaties of Oct. 20, 1832, 7 Stat. 378; Oct. 26, 1832, 7 Stat. 394; and Oct. 27, 1832, 7 Stat. 399; and evidence cited under Finding 11.

16. In 1833, some of the Potawatomi Indians still occupied small reservations comprising approximately 104,960 acres, in southern Michigan. The residents on these reservations included some members of the St. Joseph band and of the Huron band. The villages of the principal chief of the St. Joseph band, To-pen-e-bee, and of another chief of that band, Pokagon, were located within these reservations.

EVIDENCE

The acreage in the reservations was computed from the description in Article 1st of the "Articles Supplementary" to the 1833 treaty, 7 Stat. 431, 442. Negotiations for the sale of the reservations were had with the "chiefs and headmen of the St. Joseph and Notta-wa-se-pe bands." (See Journal of the Proceedings of September 27, 1833, Pet. (71-A) Ex. 14, typewritten copy at page 10). Leading chiefs who signed the Supplementary Articles, headed by To-pen-e-bee, were those who had negotiated the treaty of October 27, 1832 with the St. Joseph band (7 Stat. 399). The "Notta-wa-se-pe band" is obviously a term applied to the Indians residing at or near the village of Notta-wa-se-pe. That they included members of the Huron band is inferred from the fact that three reservations retained by the Huron band out of the cession made by the treaty of Nov. 17, 1807 (7 Stat. 105) were exchanged for other lands in the vicinity of Notta-wa-se-pe under the treaty of Sept. 19, 1827 (7 Stat. 305). The reservations acquired under the 1827 treaty were ceded under the 1833 treaty.

17. In April 1833, treaty commissioners were directed to negotiate with the United Nation for the purpose of obtaining a cession of the remaining lands of that band, and for the removal of the band west of the Mississippi River. At the same time the treaty commissioners were instructed to invite the Potawatomi Indians residing on the reservations in southern Michigan to the treaty, so as to obtain also the cession of these reservations, and the removal of the Indians thereon west of the Mississippi.

EVIDENCE

See Letter, Secretary of War Cass, April 8, 1833, Pet. (71-A) Ex. 13, in which, after giving instructions to the treaty commissioners to obtain the cession which was eventually made by the treaty of Sept. 26, 1833, he instructed the commissioners to obtain a cession of their reservations from the Potawatomi bands in Michigan "if they can be induced to attend to the treaty." It is clear that the presence of these

bands in Michigan was not considered necessary to effect the main cession contemplated.

18. Negotiations were conducted at Chicago, Illinois, in August and September 1833, between the United States treaty commissioners and representatives of the United Nation which resulted in a treaty concluded September 26, 1833, for the cession to the United States of the lands west of Lake Michigan, shown on Royce's maps, Illinois 2 and Wisconsin 1, as Area 187. The treaty provided for a grant to the United Nation of five million acres in what is now the State of Iowa. The tract so granted, with boundaries subsequently amended, is one of the tracts involved in this suit.

This grant was made pursuant to a promise of the treaty commissioners that in addition to paying the full value of the lands ceded, the United States would grant the United Nation an equivalent quantity of land west of the Mississippi River for the United Nation to remove to and occupy as its new home.

EVIDENCE

See treaty of Sept. 26, 1833, 7 Stat. 431, and the Journal of Treaty Proceedings, Pet. (71-A) Ex. 14. During the course of the negotiations Governor Porter made the following statement to the United Nation:

> "If you determine to sell your lands the Commissioners now before you are authorized by instructions from your Great father to give you the full value of them. Moreover, you shall have as much and as good a country beyond the Mississippi as that which you now possess." [Pet. (71-A) Ex. 14. See typewritten copy at page 6.]

19. Representatives of the St. Joseph band were present during the negotiations, but the band was not a party to this treaty. However the principal chief of the St. Joseph band, To-pen-e-bee, put his mark to the treaty, although none of the other representatives of that band did so.

EVIDENCE

Negotiations for the sale of the Wisconsin and Illinois lands were had with the representatives of the United Nation and only these representatives, apart from To-pen-e-bee, signed the treaty on September 26, 1833. (See: Journal of Proceedings, Pet. (71-A) Ex. 14, typewritten copy at pp. 1-40, and testimony of Dr. Wallace, Tr. 980; see 7 Stat. 431, at p. 434, for United Nation signatories of treaty concluded Sept. 26th, and Id. at page 443 for signatories of "Articles Supplementary" concluded Sept. 27th).

20. On Sept. 27, 1833, the representatives of the Indians occupying the Michigan reservations were advised by the treaty commissioners that a treaty had been concluded on the preceding day by which the United Nation had ceded its lands and that if the Indians inhabiting the reservations were willing to sell their reservations they would be permitted, with the consent of the United Nation, to participate in the benefits of the treaty concluded the preceding day.

At the same time a group of the Indians who had been converted to the Catholic religion were advised that their desire to move to northern Michigan instead of west of the Mississippi would be gratified and that their annuities would be paid in Michigan.

EVIDENCE

See Journal of Proceedings, Pet. (71-A) Ex. 14, typewritten copy at page 42.

21. By an agreement concluded September 27, 1833, designated "Articles Supplementary" to the treaty of September 26, 1833, it was provided that the Michigan reservations be ceded to the United States and that the groups of these reservations "shall be considered as parties to the said treaty to which this is supplementary, and be entitled to participate in all the provisions therein contained, as a part of the United Nation."

These "Articles Supplementary" were subscribed on behalf of the Indians on the Michigan reservations.

EVIDENCE

See Articles Supplementary to 1833 treaty, 7 Stat. 431, 442.

22. A special provision appended to the "Articles Supplementary" provided as follows:

> "And, as since the signing of the treaty a part of the band residing on the reservations in the Territory of Michigan, have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at, L'arbe, Croche." [7 Stat. 431, 445].

The group which was authorized to remain in Michigan was subsequently known as the Pokagon band. Pokagon was one of the chiefs of the original St. Joseph band. His village was located in Michigan near the Indiana border.

EVIDENCE

Pokagon's village is shown on Royce's map of Michigan. In the treaty of Oct. 27, 1832, 7 Stat. 399, Pokagon (spelled Poch-a-gan) was identified as "second Chief" (See Art. III.). He was chief of those who remained in Michigan for religious reasons (Int. Ex. I-66).

23. In the years 1834, 1835 and 1836, a number of treaties were concluded by which the reservations in Indiana retained by the village communities of the Wabash and St. Joseph bands under the treaties made in October 1832 were ceded to the Government. The first three of these treaties, concluded respectively on December 4, 1834, December 10, 1834, and December 16, 1834, made no reference to the removal of the Indians westward.

The last-cited treaty provided for the cession of the two sections on the Tippecanoe River where the Potawatomi mills were located, and by this treaty it was agreed that the United States was to be relieved of its treaty obligation to support a miller.

Between December 1834 and September 1836 ten treaties were concluded for the cession to the United States of lands reserved under the two 1832 treaties in Indiana. Each of these ten treaties contained language substantially as follows:

> "The above named chief and his band agree to yield peaceable possession of the above sections of land and remove to the country west of the Mississippi provided for the Pottawatomy nation by the United States, within two years from this date." [7 Stat. 490]

EVIDENCE

The 13 treaties cited appear in 7 Stat. respectively at pp. 467 (2), 468, 469, 490, 498, 499, 500, 501, 505, 513, 514 and 515.

24. On February 11, 1837 a treaty was concluded at Washington, D. C. by which the United States agreed to convey by patent to "the Potawatomies of Indiana" a tract of land on the Osage River southwest of the Missouri River in what is now the State of Kansas. This treaty was made with representatives of village bands for which reservations had been made under the treaties of October 26 and 27, 1832, with the Wabash and St. Joseph bands respectively.

This tract on the Osage River is the second of the two tracts involved in this suit.

EVIDENCE

See treaty of Feb. 11, 1837, 7 Stat. 532.

25. Between 1836 and 1842, the United Nation and the great majority of its members were removed to the

band's new home in Iowa. The Kankakee band, closest neighbor of the United Nation, was also removed to the Iowa tract.

During the same period, the Wabash and St. Joseph bands and the great majority of their members were removed to the tract on the Osage River. Some members of the Kankakee band moved to that tract with them.

EVIDENCE

Proportions moving west. Contemporary official population estimates of the United Nation ranged from 5,806 (Def. Ex. 54) to 6,734 (Pet. (71-A) Ex. 20). The latter figure probably included Potawatomi of Indiana (Pet. (71-A) Ex. 20). An estimate of the total Potawatomi population was 8,521, but that estimate, as reported by the Commissioner of Indian Affairs in 1840, apparently included a double count of the Potawatomi of Indiana (Pet. (71-A) Ex. 20). Contemporary figures for the numbers who removed westward range from 5,297 (Def. Ex. 27, Pet. (71-A) Ex. 20) to 5,930 (Def. Ex. 34, Int. Ex. I-154). Those remaining in Wisconsin were described in 1841 as "a remnant of the United Nation . . . about two hundred and fifty in number" (Int. Ex. I-29). The Potawatomi were "much diminished by death" (Pet. (71-A) Ex. 20). At the time of the 1846 treaty there were "somewhat upwards of 2000" on the Iowa tract (Int. Ex. I-38) and about the same number on the Osage River tract (Int. Ex. I-50-A).

Potawatomi bands in the west. All four bands are named in the preamble to the treaty of 1846, 9 Stat. 853, and were specifically referred to during the 1845 negotiations at Washington (1845 Journal, Pet. (71-A) Ex. 33, typewritten copy at pp. 6, 9). Part of the Kankakee band was located on the Osage River with the St. Joseph and Wabash bands (Int. Ex. I-50-A) and part, under Wah-bon-seh (alternative spellings, Wah-pon-seh, Wau-bun-see), a Kankakee band chief (treaty of Oct. 20, 1832, 7 Stat. 378, 380; testimony of Dr. Wallace, Tr. 945), was located in Iowa (1845 Journal, Pet. (71-A) Ex. 33, typewritten copy at p. 9). In a talk to the U. S. treaty commissioners at Wash-

ington, delivered on behalf of the Indians by Agent R. S. Eliot, he said, " . . . the people who made the treaty at Chicago, are at Council Bluffs." Id., p. 14.

26. The Huron band, the Pokagon band, and some members of the United Nation, referred to in Finding 4 as the Wisconsin Indians, did not remove westward. Findings 30 to 39, 40 to 48, and 49 to 58, relate respectively to these groups in the order named.

EVIDENCE

The evidence as to each group is set out under the findings specified.

27. On June 5, 1846, a treaty was concluded at Council Bluffs, Iowa, with the representatives of the bands then residing in Iowa, which provided for a cession of the Iowa tract and of the Osage River tract and the purchase by the Indians of a new tract of land on the Kansas River in Kansas. On June 17, 1846, this treaty was ratified by the bands then residing on the Osage River in Kansas. The treaty provided for a union of the four bands: the United Nation, the Kankakee band, the Wabash band, and the St. Joseph band, under the name of the Potawatomi Nation. The treaty provided for that Nation and its members to "receive their annuities and other benefits in common, and to abolish all minor distinctions of bands by which they have heretofore been divided. . ."

EVIDENCE

See treaty, 9 Stat. 853.

28. Subsequent to the 1846 treaty and in accordance therewith the annuities payable under the various treaties theretofore made with the individual bands united by the 1846 treaty, were combined and paid to the Potawatomi Nation. These included all outstanding annuities under Potawatomi treaties except those payable to the Potawatomi of Huron under the 1807 treaty made with that band.

EVIDENCE

Prior to the 1846 treaty, appropriations for annuity obligations were made in terms of the groups as identified by the language of the treaties. The last general appropriation act prior to ratification of the 1846 treaty, the Act of June 27, 1846 (9 Stat. 20), appropriated for "the Chippewas, Ottowas, and Pottawatomies" (at p. 22) amounts due under the treaties of 1829 and 1833; for "the Pottawatomies of the Prairie" (at p. 28), "the Pottawatomies of the Wabash" (at p. 29), and "the Pottawatamies of Indiana" (at p. 29) payments due respectively under the treaties of Oct. 20, 26, and 27, 1832; for "the Pottawatomies of Huron" (at p. 28), for the 1807 treaty annuity; and for "the Pottawatomies" (at p. 28), payments due under various other treaties in which the participating band or bands had not been identified. The first general appropriation act which followed ratification of the 1846 treaty, the Act of March 1, 1847 (9 Stat. 132), appropriated the 1807 treaty annuity for the Potawatomi of Huron (at p. 141) and all the other annuities for "the Pottawatomies" (at pp. 140-141). This was continued until 1869, when the division of the assets of the Potawatomi Nation between the Citizen and Prairie bands was begun. (See 9 Stat. 259; 389; 551. 10 Stat. 49; 233; 324; 693; 694. 11 Stat. 73, 74; 178, 179; 281; 396, 397. 12 Stat. 53; 228, 229; 520; 782, 783. 13 Stat. 169; 548. 14 Stat. 262; 505, 506. 15 Stat. 212, 213.)

With respect to a later division among the Citizen and Prairie bands and the Potawatomi of Huron, of monies due and unpaid under treaties, see Finding 34, and evidence cited.

29. As a consequence of treaties concluded in 1861 and 1867 with the Potawatomi Nation, then residing on the Kansas River in Kansas, the Potawatomi Nation was divided into two bands: one known thereafter as the Citizen Band, Petitioner in Docket No. 71-A; the other known as the Prairie Band, Petitioner in Docket No. 15-J. Thereafter assets of the Potawatomi Nation were divided between the two bands in accordance with proportions,

1400 parts to the Citizen Band and 780 parts to the Prairie Band, which had been determined by a census and agreement between the bands.

EVIDENCE

Note that this finding, except for the figures 1400 and 780, is set out in greater detail as Petitioners' findings 3-15 in Dockets 15-B and 111, to which Defendant has made no objections (See Def. Br., Docket Nos. 15-B and 111, at p. 2).

The 1861 treaty (12 Stat. 1191) effected a division of lands by individual allotments (to the Citizen Band) and by creating a diminished reserve (for the Prairie Band). It also provided for a pro rata per capita distribution of assets of the Potawatomi Nation amonng those allottees who qualified and became citizens. The 1867 treaty (15 Stat. 531) provided for the acquisition by the Citizen Band of a new tract in Oklahoma. Lands in Oklahoma were re-ceded to the United States by the Citizen Band under the agreement of June 25, 1890 (26 Stat. 989, 1016).

The proportionate division of assets was determined by census and agreement between the bands. (See Def. Ex. 33 in consolidated dockets 15-B and 111).

Commencing in 1869, funds were appropriated for the Citizen Band, while the annual appropriations for annuities were gradually reduced to the fractionate share of the Prairie Band. (See: 16 Stat. 28; 348; 558. 17 Stat. 178; 451. 18 Stat. 162.

The 1867 treaty also provided for a commission to ascertain Potawatomi claims for insufficient payments under earlier treaties. The Commission made its report on Jan. 18, 1869 (House Ex. Doc. 61, 40th Cong., 3rd Sess., Int. Ex. I-62). By the Act of March 2, 1889, 25 Stat. 988, 989, Congress directed that the amount found due by the Commission be distributed per capita, 1400/2180 parts to the Citizen Band and 780/2180 parts to the Prairie Band. (With reference to the share in the award payable to the Huron Band, see Finding 34 below.)

30. The Huron band was first identified in a treaty with the United States in the Greenville treaty of August 3, 1795, made between the United States and twelve named Indian "tribes." This treaty, which established a general boundary line between the lands of the United States and the lands of the Indians, was subscribed separately on behalf of the St. Joseph band and on behalf of the Huron band. The treaty provided for a payment of a permanent annuity of $1,000 to the "Putawatimes."

EVIDENCE

See Greenville Treaty, 7 Stat. 49, at pp. 53, 54.

31. Subsequent to the Greenville treaty the United States made three treaties in which various Indian tribes or bands participated and by which lands adjoining Lake Erie in northern Ohio and southeastern Michigan were ceded to the United States. In two of these treaties, made at Fort Industry, July 4, 1805, and at Detroit, November 17, 1807, the Huron band was identified as the particular band of Potawatomi Indians which was one party to the treaty and which was entitled to payment for its interest in the land cessions involved. These two treaties provided for the cession to the United States of the lands which are identified as Areas 53 and 54 on Royce's map of Ohio and as Area 66 of which part is shown on Royce's map of Ohio and part on Royce's map, Michigan 1.

EVIDENCE

See treaties of July 4, 1805 (7 Stat. 87 and Archives No. 44) and Nov. 17, 1807 (7 Stat. 105). See also Royce's maps, Ohio and Michigan 1. The 1805 treaty, captioned as having been made with "the Wyandot, Ottawa . . . and Pottawatima nations", provided (Art. V. 7 Stat. 88) for certain payments to be made to "the Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighborhood thereof . . ." The 1807 treaty (Art. II) provided for pay-

ment of $1,666.66 to "the Pottawatomie nation" and of a perpetual annuity of $400 "to such of the Pottawatamies, as now reside on the river Huron of lake Erie, the river Raisin, and in the vicinity of the said rivers."

32. The Fort Industry treaty of July 4, 1805 provided for a payment of the sum of $16,000 to be divided among the Huron band and "the Ottawa and Chipawa nations."

Subsequently, the Huron band asserted its interest exclusive of any other Potawatomi band in the payment provided for under the 1805 treaty, and at the same time the Huron band relinquished any interest it might have in the permanent annuity provided for by the Greenville treaty. The United States recognized the exclusive interest asserted by the Huron band to the 1805 treaty payment.

EVIDENCE

See evidence cited under Finding 31. See also, Pet. (71-A) Ex. A-43, Int. Ex. I-151, and Int. Ex. I-153.

33. The Detroit treaty of 1807 provided for the payment of a permanent annuity of $400 to the Huron band exclusively. The annuity was paid to the Huron band in Michigan until it was commuted for the sum of $8,000 and that sum, appropriated under the Act of June 29, 1888 (25 Stat. 225), was paid to the members of the Huron band.

EVIDENCE

As noted above under Finding 31, the treaty provided for the payment of $1,666.66 to the "Pottawatamie nation." In 1808 this sum was divided, half being paid at Detroit to the Huron band, the other half being paid at Chicago to other Potawatomi, who cannot be identified from the present record. The permanent annuity, however, was all paid at Detroit to the Huron band (Int. Ex. I-150 and I-153). The Huron band still claimed this annuity after the westward removal of the other Potawatomi bands (Def.

Ex. 29) and the Government continued to list it as one of the annuities payable in the Michigan Superintendency (Def. Ex. 89). After the 1846 treaty with the Potawatomi Nation, this annuity was separately appropriated for the Huron band (See Finding 28 and evidence cited). Payment under the 1888 appropriation was made in 1889 (Int. Ex. I-71).

34. In accordance with a provision of the 1867 treaty referred to above in Finding 29, a commission was appointed by the President to investigate a claim that the obligations of the United States under various Potawatomi treaties had not been carried out in full. This commission studied all of the Potawatomi treaties between 1795 and 1846 and computed the obligations of the United States through the year 1861. The Commission reported $178,953.43 due under the stipulations of treaties which had not been fulfilled, after deducting overpayments made under some treaties. Of this total, the sum of $5,000 was reported to be due and unpaid under the treaty of July 4, 1805, and the sum of $4,400 was reported to be due and unpaid under the treaty of November 17, 1807. By the Act of March 2, 1889 (25 Stat. 988) Congress appropriated the total sum so reported and directed payment out of that sum of $9,400 to the Potawatomi of Huron, and payment of the balance in the proportions stated in Finding 29 above to the Citizen Band and the Prairie Band. Payment of $9,400 plus interest was made to the Huron band.

EVIDENCE

See "Recapitulation" in report of the President's commission, p. 30 of House Ex. Doc. 61, 40th Cong., 3rd Sess. (Int. Ex. I-62); and Int. Ex. I-72. Note that the 1805 and 1807 treaties are identified in the report cited by their proclamation dates, April 24, 1806 and Jan. 27, 1808, respectively.

35. The claim of the Pokagon band to a "just proportion of all annuities" pursuant to the special provision of the 1833 treaty referred to above in Finding 22, as pre-

sented to Congress and eventually to the Court of Claims, and as determined by the Court of Claims (Potawatomie Indians v. U. S., 27 C. Cls. 403), did not include a share in the permanent annuity of the Huron band under the 1807 treaty, but included shares in all the permanent annuities and all the short term annuities continuing beyond 1833 under the treaties with the other four Potawatomi bands.

EVIDENCE

Proceedings of the President's commission, cited in Finding 34, involved treaty obligations going back to 1795. The claim of the Pokagon band involved obligations subsequent to 1833 and consequently were limited to permanent annuities or short term obligations continuing beyond 1833. This excluded the Fort Industry treaty of July 4, 1805, but included the 1807 treaty. All treaties under which annuities had not yet expired, except the 1807 treaty, were included in the reports of Congressional Committees considering the Pokagon band claim (Sen. Rept. No. 111, 38th Cong., 2nd Sess., Def. Ex. 36 and Int. Ex. I-61; House Rept. No. 19, 38th Cong., 1st Sess., Int. Ex. I-60); in the petitions filed in the Court of Claims (Int. Ex. I-73 and I-74); and in the decision of the Court of Claims (27 C. Cls. 403.) See particularly the Court's Finding VIII.

36. The claim of the Wisconsin Indians, presented in a memorial to Congress in 1902, of a right to share in the annuities paid to the Potawatomi Nation likewise excluded the 1807 treaty with the Huron band but included all other treaties providing for payments beyond 1833 to the four Potawatomi bands. The report of the Secretary of the Interior in 1908 relating to this claim also excluded the 1807 treaty but included the other treaties.

EVIDENCE

See Memorial, Def. Ex. 40, also contained in Int. Ex. I-79, at p. 20 et seq. See list of treaties at p. 30.

See also, Table No. 2 at p. 3 of the Secretary's report (House Doc. No. 830, 60th Cong., 1st Sess., Def. Ex. 41, duplicated by Int. Ex. I-85).

37. The Huron band has at all times since 1795 been a group politically distinct from and independent of the United Nation, the Kankakee band, the Wabash band, the St. Joseph band, and the Potawatomi Nation.

EVIDENCE

See Findings 6, 9-11, 30-36, and evidence cited.

38. The Huron band did not have, and never claimed, any interest in the lands which have been identified as Royce Area 187 and which were ceded to the United States by the United Nation by the treaty of September 26, 1833. The Huron band never had, or claimed, any interest in any lands on the west side of Lake Michigan.

EVIDENCE

See Findings 9, 11-14, 16-18, and evidence cited.

39. The Huron band never acquired any interest in the lands ceded by the Potawatomi Nation in 1846.

EVIDENCE

See Findings 11-14, 16-18, and evidence cited. The U. S. Indian Agent at Detroit, describing the Indians under his jurisdiction in his annual report for 1860, referred to the "Pottawatomies of Huron, who have not participated in any treaty assigning them lands." (Int. Ex. I-56).

40. Subsequent to the treaty of September 27, 1833, the Pokagon band sought to obtain a residence among, and amalgamation with, the Ottawa Indians at L'Arbre Croche in northern Michigan. Permission to reside among them was refused by the Ottawa Indians and the band returned to southern Michigan, where they purchased lands from the United States.

EVIDENCE

See memorial of the Pokagon band and extract of letter of Acting Superintendent Stuart, both in Int. Ex. I-66, at p. 7.

41. Pursuant to the special provision incorporated in the treaty negotiated September 27, 1833, the United States made some payments to the Pokagon band. However, the band claimed that it had not received all the payments to which it was entitled. In 1866, an agreement was reached between the Pokagon band and the Potawatomi Nation, with the approval of the United States, whereby the claim of the Pokagon band was settled for the sum of $39,000. Payment of this sum was made to the band pursuant to the Joint Resolution of July 28, 1866, 14 Stat. 370.

EVIDENCE

See Def. Ex. 37 and Ex. 39.

42. In a subsequent memorial to Congress in 1874, signed by Simon Pokagon, as chairman of the band's business committee, the Pokagon band challenged the adequacy of the settlement, but expressly disclaimed any interest in treaties made with the United States subsequent to 1833. The memorial stated: "By the treaty dated September 27, 1833, these Indians became separate peoples, with distinct, separate rights, by the treaty." With reference to payments made to the Potawatomi Nation under the 1846 treaty, the memorial stated: "The eastern Indians had no right to participate in these funds, and now make no claim to."

EVIDENCE

See memorial, House Misc. Doc. 5, 43rd Cong., 2d Sess., Int. Ex. I-66, at pp. 4 and 6.

43. By the Act of March 19, 1890 (26 Stat. 24), jurisdiction was vested in the Court of Claims to determine the claims of the "Pottawatomie Indians of Michigan and

Indiana," or the group which has been referred to herein as the Pokagon band. The act provided that the payment referred to above in Finding 41, was not to constitute an estoppel.

Under this Act, two groups of Indians in Michigan filed petitions in the Court of Claims. One petition (Court of Claims No. 16743) alleged a claim to a pro rata payment under all treaties with Potawatomi bands, other than the Huron band, which provided for annuities extending beyond 1833. This included a claim to a pro rata share in a permanent annuity of $300, which the United States had agreed to pay under the 1846 treaty with the Potawatomi Nation, in lieu of certain goods and services provided for under a treaty made September 20, 1828.

The other petition (Court of Claims No. 16842) alleged the same claim, and in addition alleged a claim to a pro-rata share of the monies paid by the United States to the Potawatomi Nation for the lands in Iowa and Kansas ceded in 1846.

Neither of the petitions alleged a claim to any proportion of the permanent annuity payable to the Huron band.

EVIDENCE

Intervenors' Exhibits I-73 and I-74, being copies of petitions in Court of Claims cases Nos. 16743 and 16842, respectively, of which the Commission takes judicial notice.

44. The two petitions were consolidated for trial. The court found that the number of Indians authorized by the treaty of September 27, 1833, to receive shares of annuities in Michigan was 250. The court found that other Potawatomi Indians had remained in Michigan Territory who were not beneficiaries of the special provision of the treaty made September 27, 1833. The court was unable to identify the Indians who had rights under that provision.

The court allowed a recovery based upon its findings of the proportion the number of Indians authorized to remain in Michigan bore to the number of Indians who had removed west, making an average of the variations in population which occurred through the years during which payments were not made to the Pokagon band or were insufficient.

EVIDENCE

See Potawatomie Indians v. U. S., 27 C. Cls. 403.

45. The court's allowance was based on all the treaties made with the Potawatomi bands, other than the Huron band, through 1833. It did not include any part of the monies payable to the Potawatomi Nation under the 1846 treaty, but it did include in its allowance the proportionate share of the annual payment of $300 which by the 1846 treaty was to be made in lieu of the goods and services provided for under the treaty of September 20, 1828 (7 Stat. 317).

EVIDENCE

See 27 C. Cls. at p. 407.

46. The court held that the non-emigrating Indians who were not members of the Pokagon band had no rights. With respect to the Pokagon band the court declared:

> " . . . Under the terms of this supplement a portion severed its connection with the united nation, and thereby lost its identity with the Pottawatomies as a tribe, in order that it might avail itself of the privilege of remaining in the Territory of Michigan. In ceasing to be a part of the united nation, it did not retain any part of the political or corporate power of the tribe, that was undivided and still inherent in the body which emigrated beyond the Mississippi pursuant to the terms and requirements of the treaty. The portion remaining may have acquired a right to share in the annuities, but the corporate power of the tribe

remained intact and incident to the larger body which emigrated."

EVIDENCE

See 27 C. Cls. at p. 412.

47. The Pokagon band did not have any interest in the lands which have been identified as Royce Area 187 and which were ceded to the United States by the United Nation by the treaty of September 26, 1833.

EVIDENCE

See Findings 9, 11-14, 16-18, and evidence cited.

48. The Pokagon band never acquired any interest in the lands ceded by the Potawatomi Nation in 1846.

EVIDENCE

See Findings 40-47, and evidence cited.

49. A small minority of the members of the United Nation were unwilling to emigrate westward after the 1833 treaty, and instead moved northward, into northern Wisconsin, northern Michigan and Canada. Some of them went to live with the Menominee tribe in Wisconsin.

EVIDENCE

In 1837, it was reported by Schoolcraft that about 300 members of the United Nation, "disinclined to emigrate" had gone north (Def. Ex. 86). In 1842, it was reported that, as of 1840 a number remained who "manifested an unwillingness to emigrate at that time" (Int. Ex. I-31). These were "a remnant of the United Nation . . . about two hundred and fifty in number" (Int. Ex. I-29). Some of these Indians attempted to join the Menominee tribe in northern Wisconsin (Def. Ex. 96 and Int. Ex. I-36). In 1870, the Commissioner of Indian Affairs reported to the Secretary of the Interior, with reference to "stray bands" of Potawatomi in Wisconsin:

> "These bands are remnants of their tribes that were removed years ago to the west of the Mississippi River, and comprise those who avoided

the efforts of the government to remove them, or those who refused to accompany their tribe, and some who, after being removed, returned to their old home. It is understood they are averse to leaving Wisconsin; and it might perhaps be necessary to use force to accomplish their removal. . . ." [In House Ex. Doc. No. 216, 41st Cong., 2nd Sess., Int. Ex. I-67, at p. 2].

50. In accordance with Potawatomi customs, recognized and adhered to by the United States, Potawatomi Indians who voluntarily separated themselves from their band were considered to have given up their membership and their interest in the assets of the band.

EVIDENCE

Dr. Wallace testified as to customs of the Potawatomi during the period 1795-1846 with which he was dealing (Tr. 946-947, 951-952, 955-956).

Congress recognized this common practice when in the Act of June 25, 1864, 13 Stat. 161, 172, it referred to annuities to which stray bands of Potawatomi and Winnebagoes in Wisconsin "would be entitled if they were settled upon their reservations with their respective tribes . . ."

Persons who left the Prairie Band in Kansas and went to Wisconsin gave up their membership in that band and were denied the rights of members both by the Band and the Government. They were reinstated as members only by action of the Prairie Band Council. See, in Pet. (71-A) Ex. A-57), letters: Superintendent Williams to Commissioner, March 17, 1906, and Sept. 15, 1906; Acting Commissioner to Secretary, Nov. 15, 1906, and Jan. 8, 1907.

51. The appropriation act of June 25, 1864, 13 Stat. 161, contained the following provision:

" . . . to enable the Secretary of the Interior to take charge of certain stray bands of Winnebago and Pottawatomie Indians, now in the State of Wisconsin, with a view to prevent any further depredations by them upon the citizens of that state, and for provi-

sions and subsistence, ten thousand dollars: *Provided*, That the proportion of annuities to which said stray bands of Pottowatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling and subsisting them on any other reservation which may hereafter be provided for them."

EVIDENCE

13 Stat. 161, 172.

52. No funds were retained in the Treasury earmarked to the credit of Indians of Potawatomi ancestry residing in Wisconsin.

EVIDENCE

See Int. Ex. I-85, at p. 3.

53. At various times subsequent to 1864 Congress continued to authorize payment to the Citizen Band and the Prairie Band of funds due to the Potawatomi Nation under various treaties including the 1833 and 1846 treaties. Pursuant to the 1861 treaty referred to above in Findinng 29, between the years 1870 and 1875 Congress authorized payment to the members of the Citizen Band, per capita, of that Band's pro rata share of the funds of the Potawatomi Nation held by the United States and of the capital value of the permanent annuities payable under the various treaties made originally with the four bands who were united to form the Potawatomi Nation in 1846.

Congress continued to appropriate for the Prairie Band its pro rata share of the permanent annuities until the annuities were capitalized and commuted as set out below in Finding 54. In addition, Congress continued to appropriate for the Prairie Band the interest on the capital

funds of the Potawatomi Nation retained in the Treasury for the Prairie Band after payment to the members of the Citizen Band of their pro rata share of such funds.

EVIDENCE

See evidence cited under Finding 29. See also, Int. Ex. I-85 at p. 4.

54. By the Act of April 30, 1908, 35 Stat. 70, 73, Congress authorized negotiations to be held with various Indian tribes for the commutation of their perpetual annuities due under treaties. Subsequently, negotiations were held with members of the Prairie Band whereby it was agreed that they be paid, per capita, the capital value of the annuities then being paid to the band.

By Act of April 4, 1910, 36 Stat. 269, 288-289, the sum of $187,058 was appropriated for payment to the members of the Prairie Band in accordance with that agreement.

EVIDENCE

See Pet. (71-A) Ex. A-49 to A-54 inclusive.

55. In 1902, Indians in Wisconsin claiming Potawatomi descent asserted a right to share in the annuities and funds of the Potawatomi Nation. This claim was rejected by the Commissioner of Indian Affairs. Some months later the Indians presented a memorial to Congress asserting rights under the various treaties with the Potawatomi bands and requesting relief. By the Act of June 21, 1906, 34 Stat. 380, the Secretary of Interior was directed to investigate the claims and to make an enrollment of the Indians.

EVIDENCE

See Int. Ex. I-79.

56. Acting under the 1906 statute the Secretary of the Interior caused to be enrolled 457 Indians in Wisconsin, each of whom claimed at least one ancestor, on either side, having Potawatomi blood, and who were not enrolled

with any tribe then receiving benefits from the United States. In addition, the Secretary caused to be enrolled 1,550 Indians in Canada, who claimed at least one ancestor with Potawatomi blood, regardless whether or not these Indians were enrolled with groups recognized by the Canadian Government. The ancestors of the Indians so enrolled included Menominee, Winnebago, Chippewa and Ottawa Indians.

The agent who prepared this roll for the Government, Walter M. Wooster, excluded those Indians whose Potawatomi ancestors resided in southern Wisconsin or Michigan. He also excluded Indians whose ancestors had removed west of the Mississippi.

EVIDENCE

Wooster explained in his report:

"In order to be enrolled a claimant was required to prove satisfactorily (1) that he or one of his ancestors was a member of the Wisconsin Pottawatomie tribe or band at the time of the making of the treaty of 1833, but did not move west of the Mississippi River, as required by that treaty, and consequently did not receive any of the benefits accruing thereunder; and (2) that neither he nor the ancestor through whom he claimed was or had been enrolled with any other tribe or band in the United States.

"A large number of applicants were examined who, by their own admissions, were clearly shown to be without Pottawatomie blood. They were refused enrollment and told why. In many cases where Wisconsin Pottawatomie descent was claimed a searching inquiry disclosed that their ancestors, while Pottawatomies, belonged in southern Wisconsin or to the Michigan branch known as Pokagon's band of Pottawatomies. They also were rejected." [House Doc. 830, 60th Cong., 1st Sess., at p. 14. Def. Ex. 41; Int. Ex. I-85]

The Indians enrolled in Canada included those receiving "full rights as Canadian Indians" and those

receiving no benefits from the Canadian Government (Id., pp. 17-21).

Wooster was instructed by the Commissioner of Indian Affairs to adopt the Churchill roll made the preceding year (Pet. (71-A) Ex. A-56). That roll had 414 names. Churchill reported that these Wisconsin Potawatomi were intermarried with Menominee, Winnebago, Chippewa and Ottawa (Churchill to Hitchcock, Nov. 10, 1906, part of Pet. (71-A) Ex. A-57).

Writing to one of the Indians on whom he was relying for help Wooster stated:

> "Of course, you are aware that no Indians or descendants of any Indian are desired where the ancestor came from southern Wisconsin or Michigan. Only those who are related to the band or tribe of Indians who participated in the treaty of 1833—to which you belong—are to be included." [Wooster to Wemigwans, Nov. 22, 1907, part of Pet. (71-A) Ex. A-57].

57. Commencing with the Act of June 30, 1913, 38 Stat. 77, Congress made a series of appropriations for the benefit of the Indians on the Wooster roll, who then resided in Wisconsin and Michigan. None of the funds appropriated were taken from the assets or funds of the Citizen Band or the Prairie Band.

EVIDENCE

See 38 Stat. 102; 39 Stat. 156; 39 Stat. 991; 40 Stat. 589; 41 Stat. 29; 41 Stat. 432; 45 Stat. 159.

58. The Hannahville and Forest County Communities which have intervened in this suit, comprise Wisconsin Indians enrolled as set forth in Finding 56, or descendants of Indians so enrolled.

EVIDENCE

These communities have not actually been identified by evidence in the record, but the intervenors' petition appears to relate the intervenors to the beneficiaries of the appropriations referred to in Finding 57.

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

APPENDIX [Commission]

Potawatomi Land Cession Treaties

ROYCE AREA

Date and citation	*Map*	*Nos.*	*Description of Potawatomi*
(Greenville) Aug. 3, 1795 7 Stat. 49	Ohio	11	Putawatames of the River Saint Joseph Putawatamees of Huron
July 4, 1805 7 Stat. 87 Archives No. 44	Ohio	53, 54	"such of the Pottawatima nation as reside on the river Huron of Lake Erie"
Nov. 17, 1807 7 Stat. 105	Ohio Michigan 1	66	"such of the Pottawatamies as now reside on the river Huron of lake Erie, the river Raisin, and in the vicinity of the said rivers"
Aug. 24, 1816 7 Stat. 146	Illinois 1	78	"united tribes of Ottawa, Chipawas, and Pottowotomees, residing on the Illinois and Melwakee rivers, and their waters, and on the southwestern parts of Lake Michigan"
Sept. 29, 1817 7 Stat. 160	Ohio Michigan 1	87, 88	Potawatomee tribe
Oct. 2, 1818 7 Stat. 185	Indiana Illinois 1	98	Potawatamie nation of Indians
Aug. 29, 1821 7 Stat. 218	Michigan 1 Indiana	117	Pottawatamie Nation
Oct. 16, 1826 7 Stat. 295	Indiana	132, 133	Potawatami tribe
Sept. 20, 1828 7 Stat. 317	Indiana Michigan 1	145, 146	Potawatomi tribe
July 29, 1829 7 Stat. 320	Illinois 2 Wisconsin 1	147, 148	"United Nations of Chippewa, Ottawa, and Pottawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers"
Oct. 20, 1832 7 Stat. 378	Illinois 1	177	Potawatamie Tribe of Indians of the Prairie and Kankakee
Oct. 26, 1832 7 Stat. 394	Indiana	180	Pottawatimie Indians
Oct. 27, 1832	Indiana	181	Potawatamies of the State of Indiana and Michigan Territory
Sept. 26, 1833 7 Stat. 431	Illinois 2 Wisconsin 1	187	"United Nation of Chippewa, Ottowa and Potawatamie Indians"

Note: The foregoing list is intended only to identify the various tracts ceded by Potawatomi bands to the United States. It does not include treaties later ceding reserves retained out of these tracts. For Potawatomi treaties not listed above, see Findings 12, 16 and 23.

EVIDENCE

These communities have not actually been identified by evidence in the record, but the intervenors' petition appears to relate the intervenors to the beneficiaries of the appropriations referred to in Finding 57.

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

APPENDIX [Commission]

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Oct. 2, 1818 7 Stat. 185	Indiana Illinois 1	98	Potawatamie nation of Indians
Aug. 29, 1821 7 Stat. 218	Michigan 1 Indiana	117	Pottawatamie Nation
Oct. 16, 1826 7 Stat. 295	Indiana	132, 133	Potawatamie tribe
Sept. 20, 1828 7 Stat. 317	Indiana Michigan 1	145, 146	Potawatomi tribe
July 29, 1829 7 Stat. 320	Illinois 2 Wisconsin 1	147, 148	"United Nations of Chippewa, Ottawa, and Pottawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitoouck Rivers"
Oct. 20, 1832 7 Stat. 378	Illinois 1	177	Potawatamie Tribe of Indians of the Prairie and Kankakee
Oct. 26, 1832 7 Stat. 394	Indiana	180	Pottawatimie Indians
Oct. 27, 1832	Indiana	181	Potawatamies of the State of Indiana and Michigan Territory
Sept. 26, 1833 7 Stat. 431	Illinois 2 Wisconsin 1	187	"United Nation of Chippewa, Ottowa and Potawatamie Indians"

Note: The foregoing list is intended only to identify the various tracts ceded by Potawatomi bands to the United States. It does not include treaties later ceding reserves retained out of these tracts. For Potawatomi treaties not listed above, see Findings 12, 16 and 23.

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IN THE

Supreme Court of the United States

October Term, 1958

Number 627

HANNAHVILLE INDIAN COMMUNITY, ET. AL.,
Petitioners.

VS.

THE PRAIRIE BAND OF POTAWATOMI INDIANS ET. AL.;
THE CITIZEN BAND OF POTAWATOMI INDIANS ET. AL.;
Respondents

and

UNITED STATES OF AMERICA.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

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REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

This reply of Petitioners is timely filed within the meaning of Section 24 (4) of the Rules of this Court.

The question here for this Court to settle is of general and public importance with respect to the plenary and constitutional right of Congress to legislate with respect to Indians, Indian Tribes and their property without interference by the Judiciary.

The question at issue is (as stated on page 5 of the petition and brief)—can the Court of Claims or the Indian Claims Commission by their own analysis, conclusions or inferences, "inquire into, question or modify" the action of Congress (Acts of 1864, 1906, 1913) in the

exercise of its plenary and constitutional power over Indian affairs?

Respondents have not discussed or even mentioned the question presented by the petition herein. Respondents have studiously avoided discussing the legal issue and the decisions of this Court cited (*infra*) in support of Petitioners' answer to this question. Therefore it is deemed admitted that Respondents have no answer to the question here involved.

Respondents resort to a discussion of issues and authorities that might be relevant if the plenary power of Congress were not here involved.

CONFLICT OF DECISIONS

Respondents state on page 6 of their brief:

> "Petitioners have offered no citations in support of their assertion that 'there is a conflict of decisions which this Court must settle'."

The attention of the Court is respectfully directed to pages 12 to 17 of Petitioner's brief, where Petitioners reassert that the decision of the Court of Claims and the Indian Claims Commission are in direct conflict with the decisions of this Court in *Lone Wolf* v. *Hitchcock*, 187 U. S. 544; *United States* v. *Holliday*, 70 U. S. 419; *United States* v. *Kagama*, 118 U. S. 375.

The decisions of this Court in the above cases require the Court of Claims and the Indian Claims Commission to follow what this Court did and said in the above cases.

ISSUE STATED IN THE AFFIRMATIVE

The United States Court of Claims or the Indian Claims Commission were without authority to modify, inquire into or question the action of Congress (Acts of 1864, 1906, 1913, supra) in settling the rights of Petitioners

to share in the tribal assets of the tribe to which they belonged. The Act of June 30, 1913 accorded to Petitioners what the Court of Claims is now denying them. Every issue of law and fact before the Indian Claims Commission and the Court of Claims was in 1913 before Congress and had been for many years. Congress, on three occasions, legislated with respect to those facts and the issue here (Acts of 1864, 1906, 1913). (Appx. main Brief, pp. 48A and 49A. Acts set out in full.).

On June 30, 1913 (Appx. 49A) Congress settled this issue and established the rights of Petitioners by *paying* the Indians (Petitioners and their ancestors) $447,339 as *"their proportionate share of said Indians in annuities and moneys of the Potawatomi Tribe in which they have not shared."* (Emphasis ours.) That payment as their "share" of the tribal property was an accomplished fact that definitely fixed the interest and right of Petitioners. The Court of Claims and the Indian Claims Commission may not disturb that action of Congress.

The explanations, the illogical reasons given by the Court of Claims and the Commission in voiding those Acts of Congress as indicative of what the Court or the Commission may do to destroy the power of Congress over Indian affairs if this Court does not review what the Court of Claims and the Indian Claims Commission have done herein.

Every case cited by Respondents in their briefs finds its origin in a jurisdictional Act of Congress authorizing the action of the Court. On the contrary, in the instant case, Congress *itself* decided the issue. This important distinction is not discussed by Respondents, the Court of Claims nor the Indian Claims Commission.

GOVERNMENT'S POSITION

Of this issue and situation, the United States Government, Defendant herein, although having no interest in

the dispute between Petitioners and Respondents, joined Petitioners before the Indian Claims Commission and stated (Brief of Gov. before Indian Claims Commission opposing motion to dismiss, page 45) (copy in Record):

> "The authority and power to recognize the rights of the ancestors and predecessors (Petitioners) . . . , being in Congress supreme, and having been heretofore exercised by that legislative body, the courts are powerless to ignore, or strike down such recognition, but are required to follow such Congressional action."

The Government (main Brief p. 252) after reviewing the facts before Congress at the time (1864, 1906, 1913) further states:

> "For many years subsequent to 1833, the United States saw fit to withhold the payment of all Potawatomi annuities, assets and funds to the Potawatomi Indians who failed to comply with the removal provisions of the 1833 Treaty. However, in 1908, the Government relented in this respect (this was after the Supreme Court struck down claims of forfeiture against non-emigrant Indians, *New York Indians* v. *United States*, 170 U. S. 25-26), and Congress has since corrected this situation by fully recognizing the members of the Wisconsin band of Potawatomi Indians as full fledged members of the Potawatomi Tribe, and entitled as such to share fully on a pro rata basis in all tribal annuities, assets and funds accruing to the tribe subsequent to 1833, including specifically the proceeds arising from the sale of the ceded lands. As there were no Potawatomi tribal funds then available, Congress from time ot time has appropriated public funds for that purpose[. . . ."

The Government's appeal brief before the Indian Claims Commission, page 44, contains statement to the same effect and cites the *Lone Wolf* case and other cases cited above.

If Acts of Congress that deal with Indian affairs can be subjected to theoretical, superficial or personal opin-

ions, the constitutional and plenary power of Congress will be surrendered to the Courts and the plenary power of Congress over Indian affairs will come to an end.

CONCLUSION

A Writ of Certiorari should be granted herein to settle this issue and prevent the establishment of a precedent that will encroach upon the security of Congress in dealing with Indians and Indian property and to correct the errors of the Indian Claims Commission and the Court of Claims with respect to the power of Congress over Indian Affairs.

Respectfully submitted,

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